APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6445

SCOTT THOMAS MORRO,
Plaintiff-Appellee,
v.
CITY OF BIRMINGHAM,
a Municipal Corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

July 21, 1997

Before CARNES, Circuit Judge, and HENDERSON and GIBSON *, Senior Circuit Judges.

CARNES, Circuit Judge:

Municipal liability under 42 U.S.C. § 1983 may be premised upon a single illegal act by a municipal officer only when the challenged act may fairly be said to represent official policy, such as when that municipal officer possesses final policymaking authority over the relevant subject matter. The central issue in this appeal is whether the City of Birmingham's Police Chief is a final policy-

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

maker with respect to disciplinary suspension decisions at the City's police department. Had the City not waived the issue, we would be inclined to hold that the Chief is not a final policymaker, because his disciplinary suspension decisions are subject to meaningful administrative review by the Jefferson County Personnel Board. But the City did waive the issue. For that reason and because no issue that was preserved by the City warrants reversal of the judgment, we will not reverse the judgment imposing municipal liability in this case.

I. BACKGROUND FACTS [1]

Scott Morro has been a police officer with the City of Birmingham since 1986. On June 3, 1990, Morro arrested a man named Moses Payne on a charge of disorderly conduct. At that time, Morro's partner, Officer Rodney Hall, was patrolling the Kingston Housing Project with Morro. Hall contemporaneously but independently arrested another man, Benjamin Franklin, who had attempted to interfere with Payne's arrest. Although each officer independently arrested only one suspect, Morro and Hall cross-referenced Payne's and Franklin's arrest reports by listing the two defendants as accomplices of each other. Payne pleaded guilty, but Franklin's case proceeded to trial.

Before Franklin's case went to trial, a highly-publicized event occurred at a July 4 celebration in Birmingham: The mayor's daughter, Erica Arrington, was arrested on charges of inciting a riot. Ms. Arrington was arrested by Officer Jerry Bahakel, who worked in the same precinct as Morro.

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[1] This appeal concerns only questions of law. The facts are largely, but not entirely, undisputed. For present purposes, we have resolved all such disputes by viewing the evidence in the light most favorable to Morro, as we are required to do when a case is in this posture. *See, e.g., FDIC v. Stahl*, 89 F.3d 1510, 1514 (11th Cir.1996).

Ms. Arrington was tried in municipal court before Judge Carol Smitherman. The trial was widely attended by the press and interested citizens. It lasted two days, including a Friday night and a rare Saturday session of municipal court. Morro and a number of other South Precinct officers attended parts of the trial, apparently in a show of support for Officer Bahakel. At the conclusion of the trial, Judge Smitherman found Arrington not guilty of all the charges against her.[2]

Benjamin Franklin's case was scheduled to be heard before Judge Smitherman the very next Monday. Morro was subpoenaed to court, and the City prosecutor interviewed Morro about Franklin's arrest. Apparently, the prosecutor hoped that Morro would be able to identify Franklin, even though Morro had not arrested him, because the arrest occurred contemporaneously with Morro's arrest of Moses Payne. To the prosecutor's disappointment, Morro stated that he could not remember anything about Franklin's arrest. Thereafter, Morro was excused from the courtroom. Officer Hall, who had arrested Franklin, was called as a witness, and he provided sufficient testimony to convict Franklin.

For some time after the Arrington acquittal, Judge Smitherman perceived that there were increasing instances of forgetfulness and absenteeism among officers who were called to testify in her courtroom about arrests they had made. About a month after the Arrington trial, Judge Smitherman complained to the police department about the problem, and an investigation of the matter was launched by the internal affairs division of the department. Lieutenant Lee Ann Self was assigned to conduct

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[2] Other controversial events followed Arrington's acquittal. The Police Chief, Arthur Deutcsh, fired Officer Bahakel. Subsequently, Chief Deutcsh was indicated and convicted of tampering with Arrington's arrest records, apparently in an effort to protect her. However, his conviction was reversed on appeal. *See Deutcsh v. State*, 610 So.2d 1212 (Ala.Crim.App.1992).

the investigation. That investigation was directed toward Morro and one other allegedly forgetful officer.

After concluding her investigation, Lieutenant Self recommended that Morro be disciplined for a violation of departmental rules. Morro was charged with being unprepared for court, and a hearing was held before Police Chief Arthur Deutcsh. Subsequently, Chief Deutcsh suspended Morro without pay for thirty days, and Morro thus became the first officer in Birmingham history to be charged with or sanctioned for being unprepared for court.

As he was entitled to do under applicable City rules and regulations, Morro appealed the Chief's suspension to the Jefferson County Personnel Board. The Personnel Board assigned a hearing officer, Ann Arnold, to hear Morro's case. After hearing all the evidence, she prepared a written report, which recommended that the Board rescind Morro's suspension. The Board agreed, and Morro was reinstated with back pay.

II. PROCEDURAL HISTORY

After Morro was reinstated, he filed this lawsuit, seeking declaratory, injunctive, and monetary relief against Chief Deutcsh (individually and in his official capacity) and the City of Birmingham. The City moved to dismiss the complaint, primarily on the ground that it was not supported by specific factual allegations. The district court dismissed the complaint for vagueness, but gave Morro leave to amend.

Morro timely filed an amended complaint, and the City filed an answer denying all the material allegations it contained. Following a pretrial conference, the City filed a motion for summary judgment. That motion sought summary judgment both on the merits and, alternatively, on grounds of qualified immunity insofar as Deutcsh was sued in his individual capacity. The district court denied the motion, and the City took an interlocutory appeal of the

denial of qualified immunity. Thereafter, this Court issued a three-sentence per curiam opinion that reversed the district court's denial of qualified immunity. *See Morro v. City of Birmingham*, 39 F.3d 325 (11th Cir.1994).

On March 23, 1995, the City filed a second motion for summary judgment. In that motion, the City contended that our prior qualified immunity decision established that the discipline levied against Morro was not the result of any unconstitutional policy. More specifically, the City contended:

> Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff for actual violations of the rules of the department.

Notably, the City's motion did not allege that Deutcsh was not a final policymaker with respect to departmental disciplinary matters, relying instead on the theory that Deutcsh's actions were not unconstitutional.

The district court denied the City's second summary judgment motion. Thereafter, the court held its second pretrial conference with the parties on April 5, 1995. Following that conference, the district court entered a pretrial order defining the scope of the issues remaining for trial. Absent from the pretrial order is any indication that there was any dispute about whether Chief Deutcsh was a final policymaker with respect to disciplinary suspension decisions at the police department. The issue was not even mentioned.

Following entry of the pretrial order, the City sought certification under 28 U.S.C. § 1292(b) for an interlocutory appeal of the district court's denial of its summary judgment motion. In its motion for § 1292(b) certification, the City did *not* identify as a controlling question of law whether Chief Deutcsh was a final policymaker with

respect to the discipline levied against Morro. The district court granted the § 1292(b) certification, and this Court granted permission for the appeal. However, that interlocutory appeal subsequently was dismissed for want of prosecution, because the City failed to timely file a civil appeal statement form and pay the $105.00 docketing and filing fee.

The case proceeded to a jury trial. The jury was drawn from a "holdover" venire, which consisted of eighteen white venirepersons who had not been selected for services on any of the cases called during the preceding two weeks. The City challenged the venire based on "the way jury rolls are drawn up in the Northern District [of Alabama]," but did not raise any equal protection challenge to the venire on the grounds that it was comprised of "holdover" jurors, all of whom happened to be white. The district court rejected the only venire challenge that the City did raise, and a jury was selected from the all-white holdover jury pool.

During the trial, Morro proffered three "pattern and practice" witnesses. Morro expected those witnesses to testify that they had also suffered adverse employment action at the hands of the Chief in retaliation for their participation in protected speech activities. The City objected on relevancy grounds. The district court sustained the objection on the basis that the City had conceded that the Chief was the policymaker with respect to the disciplinary decision at issue, explaining:

> Well, is it not conceded from the pre-trial, is my recollection of this case . . . that the City of Birmingham, as is true of most if not all municipalities, has as its decisionmaker ultimately with respect to police command decisions the chief, so that we're not talking about and the defendant is not attempting to distance itself from whatever it was that Chief Deutcsh did or didn't do that might or might not constitute a violation of a constitutional right or the

plaintiff because under *Pembaur* and *Praprotnik* and *Jett* he was the City.

The question then is not—And there's no requirement on the plaintiff in this case, is there, to prove that this man, the chief, did in fact exercise the authority in other instances, whether rightly or wrongly, that he exercised here? It's the City. He was the City. And I think the City concedes that.

The City did not take its next available opportunity to correct the district court's observation that it had conceded that the Chief was the final policymaker. Instead, the City adhered to its relevancy objection despite the district court's stated understanding that the objection was premised upon a concession of the Chief's final policymaker status.

Throughout the trial, and consistent with the district courts' explicitly stated rationale for excluding Morro's proffered pattern and practice witnesses, the City made no argument that the Chief was not the final policymaker for § 1983 liability purposes under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). After Morro rested his case-in-chief, the City filed a Rule 50(a) motion for judgment as a matter of law, but did not base that motion on a *Monell* defense. The court announced its intention to deny the City's Rule 50(a) motion, and shortly thereafter the charge conference began. Only then, at the charge conference, did the City attempt to raise a *Monell* issue, by contending that the Personnel Board, and not the chief, was the final policymaker with respect to police discipline. The district court did not respond favorably to the City's belated attempt to raise a *Monell defense*, and it denied the City's Rule 50(a) motion.

During the charge conference, the City withdrew its previously-submitted charge that provided: "You are instructed that the Chief of Police was an official whose acts constitute final official policy of the City of Birmingham."

The City did not offer any substitute charge on the subject during the charge conference. After the district court had finished instructing the jury, the City objected to the district court's failure to include a pattern jury instruction to the effect that municipal liability under § 1983 must be based on a policy or a decision by a final policymaker, *i.e.*, a "*Monell*" charge. The district court refused to give that charge, and the case was submitted to the jury. The jury returned a $150,000 verdict in favor of Morro, and the district court entered judgment on that verdict.

Following entry of judgment against it, the City filed a post-trial motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). In that motion, the City reiterated the argument it had made at the charge conference that Chief Deutcsh was not a final policymaker with respect to disciplinary matters at the police department. The district court denied the City's Rule 50(b) motion and set out its reasons for doing so in a memorandum opinion. With respect to the City's final policymaker argument, the district court held, among other things, that the City had failed to preserve the issue for trial. Specifically, the district court explained:

> Rule 16(e), F.R.Civ.P., provides that the final pre-trial order "shall control the subsequent course of the action unless modified by subsequent order," and that that order "shall be modified only to prevent manifest injustice." The City never requested a modification of the pre-trial order to inject a *Monell* defense. This procedural fact renders academic the question of whether the court could have made such a modification at the last minute without *causing* manifest injustice in contrast to *preventing* it.

This appeal followed.

III. ISSUES

The City raises five issues on appeal. Briefly stated, they are as follows:

1. Whether Chief Deutcsh is a final policymaker under *Monell* and whether the City preserved that issue for trial.
2. Whether the evidence was sufficient to support the jury's verdict.
3. Whether the district court committed reversible error by admitting the Personnel Board Officer's report into evidence.
4. Whether the district court committed reversible error by refusing to give the City's requested instruction on municipal liability.
5. Whether the City's equal protection rights were violated by the selection of an all-white jury from a holdover venire, and whether the City waived that issue.

IV. STANDARDS OF REVIEW

This Court reviews *de novo* a district court's denial of a defendant's renewed motion for judgment as a matter of law, applying the same standards as the district court. *See, e.g., Sherrin v. Northwestern Nat'l Life Ins. Co.*, 2 F.3d 373, 377 (11th Cir.1993). In reviewing the sufficiency of the evidence to support the jury's verdict, we draw all reasonable inferences in favor of the nonmovant, *see, e.g., Walker v. NationsBank, N.A.*, 53 F.3d 1548, 1555 (11th Cir.195), in order to determine "whether or not reasonable jurors could have concluded as this jury did based on the evidence presented," *Quick v. Peoples Bank*, 993 F.2d 793, 797 (11th Cir.1993) (citations and internal quotation marks omitted). However, questions of law presented by such motions are subject to *de novo* review. *See, e.g., Swint v. City of Wadley*, 51 F.3d 988, 994 (11th Cir.1995).

"[W]e ascribe to the trial court a broad discretion to preserve the integrity and purpose of the pretrial order. . . ." *Hodges v. United States*, 597 F.2d 1014, 1018 (5th Cir.1979) (citations omitted). We have explained that a district court should not "for fear of appellate correction, be forced into an overbroad interpretation of such orders. *Id.* at 1017. Accordingly, we will reverse the trial court's decision to follow the pre-trial order only where "the trial court has so clearly abused its discretion that its action could be deemed arbitrary." *Id.* at 1018. Similarly, we review the district court's evidentiary rulings for abuse of discretion. *See, e.g., Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 655 (11th Cir.1993).

So long as a district court's jury instruction "accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed." *U.S. v. Starke*, 62 F.3d 1374, 1380 (11th Cir.1995) (citing *McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1504, 1509 (11th Cir.1990)). On appeal, we examine whether the jury instructions, considered as a whole, were sufficient "so that the jurors understood the issues and were not misled." *Id.* (quoting *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1569 (11th Cir.1991)).

V. ANALYSIS

A. MUNICIPAL LIABILITY

1. *Monell's "Policy or Custom" Requirement*

In *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (978), the Supreme Court held that municipalities may not be held liable under 42 U.S.C. § 1983 on a theory of *respondeat superior*. Instead, municipalities may only be held liable for the execution of a governmental policy or custom. As the *Monell* Court explained:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by *those*

> *whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694, 98 S.Ct. at 2037-38 (emphasis added).

Later, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion), the Supreme Court clarified *Monell*'s "policy or custom" requirement. In *Pembaur*, the Court explained that "municipal liability may be imposed for a single decision by municipal *policymakers* under appropriate circumstances." 475 U.S. at 480, 106 S.Ct. at 1298 (emphasis added). In *Praprotnik*, a plurality of the Supreme Court held that "appointing authorities" who have authority to initiate personnel decisions are not municipal policymakers if those decisions are subject to meaningful administrative review. *See* 485 U.S. at 129-30, 108 S.Ct. at 927-28.

Since *Pembaur* and *Praprotnik*, this Court's decisions have consistently recognized and given effect to the principle that a municipal official does not have final policymaking authority over a particular subject matter when that official's decisions are subject to meaningful administrative review. *See Scala v. City of Winter Park*, 116 F.3 1396, 1398-99 (11th Cir.1997) (holding that city manager was not a final policymaker with respect to employment termination decisions at municipal fire department where those decisions were reviewable by the city civil service board); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 638 (11th Cir.1991) (holding that a mayor was not a final policymaker with respect to zoning decisions where the city charter provided that the city counsel could override the mayor's veto of zoning ordinances); *Mandel v. Doe*, 888 F.2d 783, 792-94 (11th Cir.1989) (recognizing that a municipal officer has final policymaking authority when his decisions "are not subject to review" and holding that discretionary review initiated

by the municipal official himself does not prevent the official from being a final policymaker); *cf. Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir.1996) (accepting concession that city police chief was not final policymaker with respect to employment decisions where police chief's decisions could be reversed by the city manager); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 713-15 (11th Cir. 1992) (finding final policymaking authority where "the City Manager's decision to hire or fire administrative personnel is completely insulated from review").

Under our precedents, it is extremely doubtful that Chief Deutcsh is a final policymaker with respect to police discipline such that he may subject the City to § 1983 liability. As the City points out, the Chief's disciplinary decisions regarding dismissal, demotion, or suspension are subject to review by the Jefferson County Personnel Board, with limited further review by the Circuit Court. In fact, the Personnel Board reviewed and reversed the Chief's decision in this case, which demonstrates that the Personnel Board is not meerly a rubber stamp for the Chief. Additionally, attached as appendices to the City's appellate brief are copies of excerpts from the Enabling Act of the Personnel Board of Jefferson County, 1945 Ala. Acts 248 (as amended), the Personnel Board of Jefferson County Rules and Regulations, and the City of Birmingham Supplemental Personnel Policies and Procedures. Those materials seem to take final decisionmaking authority on dismissals, demotions, and suspensions out of the Chief's hands.

Based on the City's governing regulations and evidence of its actual practices, it seems that local law makes the Jefferson County Personnel Board, and not the police chief, the final policymaker with respect to police dismissals, demotions, or suspensions. If the City had preserved that issue for trial in the district court, and thus for our review on appeal, we have little doubt that the City would be entitled to escape the judgment against it on

that basis. However, as the district court noted in its memorandum opinion, the City failed to identify its potentially available *Monell* defense as an issue at the pretrial conference or to obtain a modification of the pretrial order to permit it to raise the issue later in the proceedings.

2. *The City's Failure to Preserve Its Monell Defense*

Federal Rule of Civil Procedure 16(e) provides for the effect that pretrial orders shall have:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Fed.R.Civ.P. 16(e). The use of shotgun pleadings in civil cases is a ubiquitous problem. *See, e.g., Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 168 (11th Cir.1997) (noting that the complaint in that case was "typical of the sort of shotgun notice pleading we have encountered in scores of cases brought before this Court"). Given the seriousness of that problem, it is "particularly important for district courts to undertake the difficult, but essential, task of attempting to narrow and define the issues" before trial. *Id.* Critical to proper discharge of that duty is effective use of pretrial orders, which in turn requires that such orders be firmly (but fairly) enforced.

We have not hesitated to back up district courts when they put steel behind the terms of pretrial orders and hold parties to them. We held in *Hodges v. United States*, 597 F.2d 1014, 1017 (5th Cir.1979), that a defendant can waive a potential defense by failing to ensure that the issue is clearly preserved in the pretrial order. *Hodges* involved a suit brought by two taxpayers who sought a refund of taxes they had paid on behalf of a defunct corporation.

See id. at 1015. At trial, the primary defense of the IRS was that the taxpayers had no standing to sue because they had paid the corporation's taxes as "mere volunteers who had no legal obligation to pay." *See id.* at 1016. However, the IRS also sought to introduce evidence related to an alternative defense that the taxpayers were in fact liable for the amounts paid. *See id.* The district court refused to allow the IRS to assert that alternative defense at trial. It held that the defense was not preserved in the pretrial order, even though the order listed as an issue for trial "[w]hether or not [the taxpayers] can recover the amount sued for on the ground that they had no legal liability to pay. . . ." *Id.* at 1017 n.5.

On appeal, the IRS contended that the foregoing statement in the pretrial order encompassed its alternative defense and, alternatively, that the district court should have modified the pretrial order to conform to the proffered evidence. We upheld the district court's construction of the order, as well as the court's refusal to modify it during the trial. We explained:

> We don't believe the trial judge should, for fear of appellate correction, be forced into an overbroad interpretation of such orders. . . . Without the above rule all litigants would have the burden of anticipating issues whose possible presence in an obfuscated pretrial order is overshadowed by the opposing party's active assertion of totally inconsistent issues. We cannot hold that the district court acted arbitrarily in viewing the unclear pretrial order as not fairly apprising the taxpayers of the defense which the IRS later sought to assert.
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> We now turn to the IRS's contention that the district court should have allowed the pretrial order to be modified. . . . [W]e ascribe to the trial court a broad discretion to preserve the integrity and purpose of the pretrial order, and in reviewing trial court

> decisions which prevent the introduction of otherwise competent and relevant evidence we will not disturb the trial court's ruling unless it is demonstrated that the trial court has so clearly abused its discretion that its action could be deemed arbitrary. Under the particular facts of this case we cannot say that the district court's actions were arbitrary. . . . We also take note that any injury resulting from our [decision], putting aside issues of surprise and inconvenience . . . is a direct result of the IRS's own failure to properly present its case.

Id. at 1017-18 (citations and footnote omitted).

The standard enunciated in *Hodges* is the law of this circuit, and we have not been shy about applying it. *See Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423, 427 (11th Cir. 1993); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 844 (11th Cir.1991); *Braswell v. ConAgra, Inc.*, 936 F.2d 1169, 1176 (11th Cir.1991); *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1368 (11th Cir.1988). Applying that standard to this case, we cannot say that in interpreting the pretrial order as not including the final policymaker defense, the district court so clearly abused its discretion that its action can be deemed arbitrary.

Likewise, we cannot say that the district court abused its discretion by failing to modify the pretrial order to accommodate presentation of the *Monell* defense at the late stage of the case at which the City chose to press it. That is particularly so in view of the fact that the City successfully convinced the district court to exclude Morro's pattern and practice witnesses on grounds of relevancy and then stood silent in the face of the district court's observation that the City had conceded at the pretrial conference that the Chief was a final policymaker. As in *Hodges*, we "take note that any injury resulting from our [decision], putting aside issues of surprise and in-

convenience . . . is a direct result of the [defendant's] failure to properly present its case," 597 F.2d at 1018.[3]

B. SUFFICIENCY OF THE EVIDENCE

The City contends that Morro put on insufficient evidence that he was disciplined in retaliation for his First Amendment activity, because: (1) Morro admitted being unprepared for trial; (2) Morro's proof of causation was based solely on the chronology of events; and (3) the Chief's actions were objectively reasonable in light of clearly established law. We find no merit in those arguments.

First, the City provides no record citation for Morro's purported "admisssion" that he was unprepared for court. Our own review of the record has not revealed any such admission, which Morro continues to deny having made. Moreover, even if Morro had made such an admission, it would still be up to the jury to decide whether the Chief's disciplinary decision was actually motivated by Morro's unpreparedness or by his show of support for Officer Bahakel in the Arrington trial. If Morro "pro-

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[3] We note that the City's failure to preserve its *Monell* defense for trial is not excused by the fact that, as we explain *infra* Part V.D, the issue of final policymaker status is a legal question for the court, not the jury. Counsel may waive the right to have an issue decided by failing to identify the issue to the court at the pretrial conference, regardless of whether the issue is a legal or factual one. *See Lexington Ins. Co.*, 835 F.2d at 1368 (explaining that the "same policy applies to . . . legal issues" as factual ones). This case illustrates the sensibility of that rule. Had the City identified the Chief's alleged policymaker status as an issue, the district court might have granted judgment as a matter of law for the City early in the proceedings, after the court had an opportunity to evaluate the question in light of the evidence offered by Morro's pattern and practice witnesses. Instead, both the court and the plaintiff were blindsided with the issue at the end of the case, after the court had excluded because of the City's objection Morro's pattern and practice evidence. That sort of ambush is precisely what the pretrial conference and order are designed to avoid.

duced enough evidence for a reasonable jury to conclude that a retaliatory animus substantially motivated his [suspension], [the City] could only rebut this showing by convincing the jury, not the court, that a legitimate reason justified the decision." *Beckwith v. City of Daytona Beach Shores,* 58 F.3d 1554, 1564 (11th Cir. 1995) (citation omitted). The City failed to do that.

Second, Morro's proof of motive was not based solely on the chronology of events. The very officer who disciplined Morro was involved in a high visibility controversy over whether he had tampered with arrest records in an attempt to protect Ms. Arrington, and testimony concerning that controversy was presented at trial. In view of the entire record, a reasonable juror could have inferred that the Chief was motivated to act against Morro by a desire to punish his First Amendment activity that tended to reflect unfavorably upon the mayor, his daughter, or the Chief.

Finally, the City's clearly established law argument is irrelevant. The issue before us is not qualified immunity, but evidence of a retaliatory motive. As we have explained above, the evidence was sufficient to support a finding of retaliatory motive.

C. ADMISSION OF THE PERSONNEL BOARD OFFICER'S REPORT

Over the City's objection, the district court admitted into evidence the report of Personnel Board Officer Ann Arnold, which recommended that Morro be reinstated, because the charges against him were "not supported by the evidence." In view of that recommendation, the report could be read to imply that the Chief lacked a proper motive in disciplining Morro.

The City concedes that the report was "arguably relevant," but contends that its admission unfairly prejudiced the jury and confused the issues. Morro responds that the

City opened the door to this evidence by suggesting, in its opening statement, that Morro "got a personnel board officer who felt sorry for him." In other words, Morro contends that by introducing the report, he was able to rebut the notion that the personnel board officer made her decision based on emotional factors. Even if admission of the report was otherwise objectionable, the City did open the door to its admission.

Moreover, we note that the district court gave a limiting instruction on the report. Specifically, the district court charged the jury as follows:

> I want to stop because I think I forgot when I talked about what's not evidence, in evidence is the personnel board hearing officer's recommendation upon which the personnel board restored the plaintiff to his job position upon making a decision that the discipline had been improperly imposed. Now, I let that in evidence, and so it is evidence because its in. But I want to explain to you and make sure you understand that the personnel board does its thing, I do my thing, and you do your thing. They are not the same thing. And the mere fact that the personnel board has made a determination, whatever it is, is not binding on you. It does not adjudicate or determine as a final matter of law or fact that Scott Morro did not intentionally or deliberately or negligently fail to be prepared to testify, which is what the charge was. The personnel board made its choice and decision based on what it had. And you had some of the same evidence perhaps that it had. But what it decided does not bind you one way or the other. It's some evidence for you to consider for whatever weight you want to give it. You can give it some weight or no weight.

That limiting instruction was adequate. Particularly in view of that instruction, we cannot conclude that the district court abused its discretion in admitting the report.

D. JURY INSTRUCTIONS

After the initial jury charge, the City objected and requested that the court give the jury the following pattern instruction, or its equivalent:

> Plaintiff claims that the city of ————, a municipality, is liable to him for the constitutional deprivations that he alleges. You are instructed that the city of ———— may be liable where you find that plaintiff has been deprived of his constitutional rights and such deprivation was done pursuant to a governmental custom, policy, ordinance, regulation or decision. When the plaintiff is injured as a result of a government's policy, custom, regulation or decision, whether made by its lawmakers or by those officials whose edicts or acts may fairly be said to represent official policy, the city itself is responsible for the injury that it caused.

Federal Jury Practice and Instructions Vol. 3 § 103.11. The district court declined to give the requested instruction.

We note first that the City's argument concerning its requested instruction is, essentially, a warmed-over helping of its belated *Monell* defense, which we have already held that the City failed to preserve for trial. Even putting that problem aside, however, the City would not have been entitled to the requested instruction, because it puts a question of law before the jury.

In general, we review a district court's refusal to give a requested instruction by applying the following analysis:

> If a requested instruction is refused and is not adequately covered by another instruction, the court will first inquire as to whether the requested instruction is a correct statement of the law. . . . If the instruction is a correct statement of the law, the court will next look to see whether it deals with an issue which is properly before the jury. . . . In the event both

> these standards are met, there still must be a showing of prejudicial harm as a result of the instruction not being given before the judgment will be disturbed.

Dempsey v. Mac Towing, Inc., 876 F.2d 1538, 1542 (11th Cir.1989) (citations omitted) (alterations in original).

Having reviewed the district court's instructions to the jury, we are satisfied that the "policy or custom" component of the proposed instruction was not covered by any other instruction. Therefore, under *Dempsey*, the next question is whether the requested instruction is a correct statement of the law. We are satisfied that it is, and we note that Morro does not argue otherwise. Accordingly, we next examine whether the requested instruction deals with an issue which is properly before the jury. We conclude that the requested instruction fails that prong of the *Dempsey* analysis.

There is no question in this case that the decision to suspend Morro was made by Chief Deutcsh. If the Chief is the final policymaker with respect to the area in question, that single decision can give rise to municipal liability. *See Pembaur*, 475 U.S. at 480, 106 S.Ct. at 1298-1300, 89 L.Ed.2d 452 (finding municipal liability for violation of plaintiff's Fourth Amendment rights where deputy sheriffs unlawfully entered the plaintiff's office on the express instructions of the county prosecutor). However, the Supreme Court has made plain that the question of whether the Chief is a final policymaker is a legal question for the court, not the jury. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989). Therefore, to the extent that the requested instruction asks the jury to determine whether the Chief's actions may fairly be said to represent official policy, that question is not properly before the jury, even if the issue had been waived at the pretrial conference. The district court did not err in refusing the requested instruction.

E. COMPOSITION OF THE JURY VENIRE

After completing its voir dire examination, the City challenged the racial composition of the jury venire based on "the way jury rolls are drawn up in the Northern District [of Alabama]." However the City did not raise any equal protection challenge to the venire on the grounds that it was comprised of white "holdover" jurors until the City filed its post-trial motion for judgment as a matter of law.

The Jury Service and Selection Act of 1968, 28 U.S.C. § 1861 *et seq.*, governs the selection of federal juries. It provides that juries should be selected at random from a fair cross section of the community, § 1861, and outlaws racial discrimination in jury selection, § 1862. In other words, the Act provides the statutory method for enforcing the constitutional rights of litigants in the jury selection process. It also provides a specific method by which challenges to a civil petit jury may be raised:

> § 1867. Challenging compliance with selection procedures
>
> . . . .
>
> (c) In civil cases, *before the voir dire examination begins*, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.
>
> . . . .
>
> (e) The procedures prescribed by this section shall be the *exclusive* means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title.

Id. § 1867(c) & (e) (emphasis added).

In *United States v. Green*, 742 F.2d 609, 612 (11th Cir.1984), this Court held that a criminal defendant's failure to comply with the provisions of § 1867 precluded him from raising on appeal a constitutional challenge to the petit jury venire. We held that "[i]n the absence of strict compliance, Green's attempt to challenge the jury venire on constitutional grounds is without legal effect and is futile." *Id.* *Green* was a criminal case, but it would be anomalous if criminal defendants were held to stricter compliance with § 1867 than civil litigants. The City's equal protection objection to use of an all-white holdover venire was not in compliance with § 1867, because it was not timely. Therefore, under *Green*, the City's equal protection challenge to the holdover jury venire could not be entertained by the district court and cannot be entertained on appeal. Of course, we do not mean to imply that the challenge was in any way meritorious.

VI. CONCLUSION

The City failed to preserve the issue of whether the City of Birmingham's Police Chief is a final policymaker with respect to disciplinary suspension decisions at the City's police department. The City's arguments related to evidentiary sufficiency, admission of evidence, and jury instructions lack substantive merit. The City's equal protection challenge to the composition of the jury venire was untimely. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ALABAMA
SOUTHERN DIVISION

Civ. A. No. 92-AR-2339-S

SCOTT MORRO,

Plaintiff

v.

CITY OF BIRMINGHAM, *et al.*,

Defendants.

March 23, 1995

MEMORANDUM OPINION

ACKER, District Judge.

The court has for consideration the renewed motion of defendants, City of Birmingham (the "City") and Arthur Deutcsh ("Deutcsh"), in his official capacity as police chief of the City, for summary judgment.

On August 20, 1992, this court denied an earlier motion for summary judgment which had been filed by the City and by Deutcsh, both individually and in his official capacity. The case was originally brought by Scott Morro, a City police officer, pursuant to 42 U.S.C. § 1983, charging that defendants had wrongly disciplined him for exercising his First Amendment right of association and of free speech as a result of his attendance at the public trial of Erica Arrington ("Arrington"), the daughter of the City's

mayor, after her well-publicized arrest. The handling of that arrest led to the criminal conviction of Deutcsh for allegedly altering Arrington's jail records. In denying that first Rule 56 motion, this court noted that there was some evidence that Deutcsh, who had the authority to discipline police officers, had disguised his real reason for his disciplining of Morro by charging Morro with admittedly being unprepared to testify in an unrelated, separate misdemeanor case. The Personnel Board of Jefferson County, which is the body charged with reviewing any discipline meted out to a City employee, agreed with Morro on his appeal from Deutcsh's discipline. This Personnel Board ruling constituted a finding by that tribunal, which had jurisdiction over the matter, that the discipline administered by Deutcsh was unwarranted and, arguably that it was not legitimately traceable to Morro's unpreparedness as a witness.

After this court denied defendants' first said motion for summary judgment, defendants filed a joint notice of appeal to the Eleventh Circuit. On October 19, 1994, a panel of the Eleventh Circuit, in a one-paragraph unpublished *per curiam* opinion, held:

> Given the undisputed facts on Morro's lack of preparedness for court, it was objectively reasonable to discipline Morro. So, Chief Deutcsh, as a matter of law, is entitled to qualified immunity. The district court's order denying summary judgment to Deutcsh in his individual capacity is REVERSED.

The panel said nothing about the separate, simultaneous purported appeals from the denials of the motions for summary judgment by the City and by Deutcsh in his official capacity. This conspicuous absence impliedly either constituted an affirmance of this court's denial of these two separate motions for summary judgment or constituted a dismissal of the appeals taken by the City and by Deutcsh officially because of a lack of appellate juris-

diction inasmuch as these two defendants could not raise qualified immunity as a defense and therefore could not take an early, preemptive appeal as could Deutcsh individually under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

The panel opinion is certainly subject to being interpreted as a finding that Deutcsh, as a fact, decided to discipline Morro only because of Morro's unpreparedness, despite what appears to be a conflict in the evidence on this subject. This court prefers to believe that Deutcsh individually enjoys qualified immunity because a trier of fact could reasonably believe Deutcsh's version of his motivation for disciplining Morro, and, if it does believe him, his reason would be "objectively reasonable" and thus within constitutional norms. This court cannot disagree with the Eleventh Circuit's description of Morro's lack of preparedness as being "undisputed." It may be true that Morro was unprepared as part of his participation in an organized police officers' protest against Deutcsh's handling of the Arrington affair, something that, if true, is a two-edged sword. What bothers this court as it considers these renewed motions for summary judgment by the City and by Deutcsh in his official capacity is the circumstantial evidence which suggests that Deutcsh's finding of a "lack of preparedness," although factually justified, was in reality a pretext to cover Deutcsh's real or predominant reason, namely, to protect Deutcsh and Arrington from adverse publicity by the use of intimidation. It is indisputably possible that on the proffered evidence a reasonable factfinder, evaluating demeanor and making credibility determinations, could conclude that Deutcsh's true motive for disciplining Morro was retaliation and was unconnected to, or only marginally connected to, Morro's lack of preparedness.

The current joint motion contains the following assertions:

1. The United States Court of Appeals has ruled as a matter of fact that the evidence in this cause shows indisputably that plaintiff was unprepared for court.

2. The United States Court of Appeals has also ruled that based upon plaintiff's unpreparedness it was objectively reasonable to discipline plaintiff.

3. The claims plaintiff has alleged against these defendants are based upon these defendants disciplining him for violating a departmental rule of the Birmingham Police Department. That rule in effect required plaintiff and other officers to be prepared to prosecute cases in which they are involved.

4. If the fact of plaintiff's unpreparedness has been determined against him there does not remain in this case a genuine dispute as to the facts which plaintiff alleges are the basis of the wrong done him by the defendants.

5. The fact established in this case by the Court of Appeals ruling means as a matter of law and fact that the disciplining of plaintiff does not proceed from an unconstitutional practice or policy to violate the rights of plaintiff or of any other person. It is not unconstitutional policy to discipline personnel for actual violation of rules.

6. Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff for actual violations of the rules of the department. The ruling of the Court of Appeals has established that plaintiff was in violation of those rules in that he was unprepared for court and that was the basis for his discipline.

Defendants' memorandum brief, submitted in support of their present Rule 56 motion, contains, *inter alia*, the following statements:

> On July 4, 1990 a City police officer arrested Erica Arrington, the daughter of Mayor Richard Arrington, on misdemeanor charges. Her trial was begun on July 20, 1990, and was attended by interested citizens, including a number of police officers, including Scott Morro.
>
> * * * *
>
> After earlier hearing arguments and receiving briefs on the issue, the Court of Appeals found as an undisputed fact that Morro was unprepared for court. The court stated *per curiam*, that it was objectively reasonable to discipline Officer Morro.
>
> * * * *
>
> After a supplementary status and scheduling conference on February 22, 1995 on the remaining issues before the district court, defendants filed another motion for summary judgments on the reasoning that the Court of Appeals had decided the central and remaining factual issue in favor of the defendants: to-wit, that Morro was unprepared for court.
>
> * * * *
>
> The City has maintained that the reason for the imposition of discipline on Officer Morro was his unpreparedness for court. While Morro has disputed that he was unprepared for court, he clearly was so unprepared and now the Court of Appeals has found that the issue as to his unpreparedness is undisputed.
>
> * * * *
>
> In the opinion of the District .Court, denying defendants' first motion for summary judgment, the District Court determined that there was a genuine issue of material fact concerning Deutcsh's and the

> City's motivation for disciplining Morro. Then as now the defendants assert that the motivation for the discipline was the undisputed unpreparedness of Morro.
>
> * * * *
>
> To allow this suit to proceed under these facts would inhibit the City and its police department from investigating any officer for any clear rule violation. All the officer would need to do to frighten off discipline is mention some association thought to be frowned on or unpopular with City officials.

As can be seen, the gravamen of the current motion and its supporting brief is movants' insistence that the Eleventh Circuit has now established the law-of-the-case to be that Deutcsh was, in *fact*, motivated only by Morro's unpreparedness, a motive that was, as a matter of fact and law, objectively reasonable and therefore was constitutionally permissible. If movants are correct in their logic starting with the Eleventh Circuit opinion, it would follow that their motions must be granted; but, if movants' logic is correct, why did the Eleventh Circuit not proceed, as it easily could have done, to reverse this court's denial of summary judgment to the City and Deutcsh in his official capacity? This court is left with somewhat of an enigma and a dilemma. This court now attempts to resolve both by expressing its belief that the law of the Eleventh Circuit with respect to qualified immunity is not and cannot be that such absolute immunity is always available as a defense for an individual official if his *articulated* explanation for his action or inaction is "objectively reasonable," that is, not contrary to clearly established constitutional principles, even though that *articulated* explanation may be legitimately disputed as not being the real reason. If this court accepted movants' rationale, Deutcsh, not only individually but also in his official capacity, will be completely off the § 1983 hook. But, if this court is correct in its understanding of the Eleventh Circuit's view of the

qualified immunity defense, the City, and Deutcsh in his official capacity, remain on the § 1983 hook, because a jury may choose not to believe that Deutcsh's *actual* motive for administering discipline to Morro was what Deutcsh says it was.

The City's earlier denied motion for summary judgment pointed out that Morro had not alleged a policy or practice by the City to similarly violate plaintiff's or others' constitutional rights or that the liability sought to be imposed on the City is predicated on a theory of *respondeat superior* contrary to the teaching of *Monell v. Dept. of Soc. Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Morro argued then in response that "the City grants to Deutcsh the final authority to suspend, reprimand, and punish officers and therefore he was the final policymaker with respect to matters involving officer conduct," invoking *Owens v. Fulton County*, 877 F.2d 947 (11th Cir.1989), and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), as legitimate ways around *Monell* in this case. This court not being familiar with the briefs filed in the Eleventh Circuit, or with the issues the parties actually argued to that court, this court cannot be 100% sure of what the Eleventh Circuit's intended message to this court is with respect to the now asserted summary judgment defenses of the City and of Deutcsh in his official capacity. This court's best judgment is that if the City and Deutcsh in his official capacity were entitled to summary judgment, the Eleventh Circuit would have reversed this court entirely, the mandate would have been unequivocal, and the case would be over. If this court should grant the renewed motion for summary judgment, it would be extending the Eleventh Circuit's opinion beyond what the Eleventh Circuit could have intended.

The court understands why the City would make the argument it now makes. How could an act by a City official that is "objectively reasonable" create § 1983 lia-

bility for the City? This is an interesting question, so interesting in fact that if requested to do so by the City and/or by Deutcsh in his official capacity, the court will enter a certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), because if the City is right in its reading of the Eleventh Circuit's opinion, Morro should not be allowed to proceed to trial, which would be a waste of time.

UNITED STATES DISTRICT COURT
N.D. ALABAMA
SOUTHERN DIVISION

Civil Action No. 92-AR-2339-S

SCOTT THOMAS MORRO,
Plaintiff
v.
CITY OF BIRMINGHAM,
Defendant.

April 12, 1996

Addendum to Opinion April 17, 1996

MEMORANDUM OPINION

ACKER, District Judge.

This case began on October 2, 1992, with a complaint filed by Scott Morro ("Morro"), a policeman for the City of Birmingham ("City"), against the City and Arthur Deutcsh ("Chief"), individually and in his official capacity as Chief of Police of the City. Morro's amended complaint, trimmed of some of the particulars required by the court, charged that the Chief suspended him without pay as punishment for his having attended the trial of Erica Arrington, the daughter of the City's Mayor, as an expression of solidarity with his fellow patrolman, Jerry Bahakel, who had arrested Ms. Arrington. The arrest of Ms. Arrington was a highly publicized and controversial event. Ms. Arrington was acquitted in City court. Bahakel was fired by the Chief. The Chief was subsequently indicted

and convicted of tampering with Ms. Arrington's arrest records.

Morro, apparently anticipating a defense based on *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), circumvented it by alleging that the ultimate policymaker for the City in matters of police discipline was the Chief. In this regard Morro invoked the line of cases that includes *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

After this court denied motions for summary judgment filed by defendants, they filed a joint notice of appeal to the Eleventh Circuit. The only defendant who had the right to an automatic interlocutory appeal was the Chief in his individual capacity, based on his defense of qualified immunity. A *per curiam* unpublished opinion of the Eleventh Circuit issued on October 19, 1994, agreed with the Chief's qualified immunity defense and held:

> Given the undisputed facts on Morro's lack of preparedness for court, it was objectively reasonable to discipline Morro.

When the subsequent mandate was received by this court, the earlier order denying the Chief's motion for summary judgment in his individual capacity was vacated, and the action as against the Chief individually was dismissed with prejudice.

The "undisputed facts on Morro's lack of unpreparedness" included a dispute as to whether Morro had a legitimate excuse for not being able to identify a particular culprit where two arrests had been made separately but contemporaneously during a neighborhood disturbance. The two arrests were separately effected by a pair of patrolmen, one of whom was Morro. Morro's attention at the time of the dual arrests was arguably focused on the

subject whom he chased and cuffed and not on the other arrestee who was taken into custody by his fellow officer. Both officers were subpoenaed for the misdemeanor trials of the two persons arrested. Morro's subject pled guilty. The other officer was able to identify the person who pled "not guilty," namely, the one he cuffed, and that person was found guilty without the benefit of any testimony from Morro, who, after telling the prosecutor that he could not identify that person, was told by the prosecutor to go home. If Morro is at all credible, it would be just as logical to describe him as "truthful" and "careful not to commit perjury" as it would be to describe him, as the Chief did, as "unprepared to testify." In any event, the Chief, who was himself under investigation for alleged records tampering, signed the charge of unpreparedness developed against Morro by "internal affairs." It was the first such charge ever made against a policeman in the known history of the City. The complaint against Morro originated with the City judge who had found Ms. Arrington "not guilty" while Morro was sitting on the front row of her full courtroom, and who a few days later found the miscreant guilty despite her subsequent conclusion that Morro was "unprepared" to testify against him.

The Chief, in his capacity as the principal executive officer of the Police Department, conducted a hearing on his charge against Morro. The Chief then made the decision to suspend Morro for 30 days without pay. For the purposes of a "qualified immunity" analysis, the Chief's action, as found by the Eleventh Circuit, was "objectively reasonable," in that it was within the realm of logic, but the question clearly remained as to whether the Chief's true motive was something other than what was characterized as Morro's "unpreparedness." Morro appealed his suspension to the Personnel Board of Jefferson County, which, after a *de novo* hearing by a hearing officer, reversed the Chief's decision and reinstated Morro with pay. In other words, the Personnel Board, which considered

virtually the same evidence that the jury in this case eventually heard, agreed in advance with the jury, and either rejected the objectively reasonable conclusion that Morro was "unprepared" or found that the charge of "being unprepared" was simply a pretext for making Morro an example of what can happen to an officer who engages in symbolic speech against the personal interests of the Chief and/or the Mayor on a matter of public interest and concern.

On February 27, 1995, after the Eleventh Circuit had eliminated the action as against the Chief individually, the City and the Chief in his official capacity renewed their motion for summary judgment. The renewed motion added the following grounds:

> 1. The United States Court of Appeals has ruled as a matter of fact that the evidence in this cause shows indisputably that plaintiff was unprepared for court.
>
> 2. The United States Court of Appeals has also ruled that based upon plaintiff's unpreparedness it was objectively reasonable to discipline plaintiff.
>
> 3. The claims plaintiff has alleged against these defendants are based upon these defendants disciplining him for violating a departmental rule of the Birmingham Police Department. That rule in effect required plaintiff and other officers to be prepared to prosecute cases in which they are involved.
>
> 4. If the fact of plaintiff's unpreparedness has been determined against him there does not remain in this case a genuine dispute as to the facts which plaintiff alleges are the basis of the wrong done him by the defendants.
>
> 5. The fact established in this case by the Court of Appeals ruling means as a matter of law and fact that the disciplining of plaintiff does not proceed from an unconstitutional practice or policy to violate

> the rights of plaintiff or of any other person. It is not unconstitutional policy to discipline personnel for actual violation of rules.
>
> 6. *Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff* for actual violations of the rules of the department. The ruling of the Court of Appeals has established that plaintiff was in violation of those rules in that he was unprepared for court and that was the basis for his discipline.

(emphasis supplied).

The Belated Monell Defense

Neither defendants' original answer to the amended complaint nor defendants' statement of position in the pre-trial order contains an assertion by the City that the Chief was not the City's final policymaker holding a position that could render the City liable pursuant to 42 U.S.C. § 1983 if, operating as such, the Chief deliberately violated an employee's First Amendment right. At the pretrial conference, and throughout the case, there was never any insistence by the City on a *Monell* defense. The closest thing to such a defense was affirmative defense No. 31 contained in the City's answer: "Plaintiff fails to state a claim against the defendant, the City of Birmingham, for which he is entitled to relief." The City went so far as to interpose the so-called *Mt. Healthy* defense, which presupposed a violation by the City of Morro's First Amendment freedom of expression.

On May 23, 1995, this court denied defendants' renewed motion for summary judgment. Thereupon, the City and the Chief in his official capacity formally requested this court to certify that ruling for an interlocutory

review by the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b). The court promptly honored their request, recognizing that a successful appeal of the denial of the renewed motion for summary judgment would be dispositive. The Eleventh Circuit agreed, because on June 2, 1995, it granted defendants' petition for permission to appeal. However, on July 25, 1995, the Eleventh Circuit entered an order dismissing defendants' said appeal "for want of prosecution." A dismissal for want of prosecution is a dismissal *with prejudice*. This particular dismissal constituted an adjudication against the City on the merits of its appeal, establishing as a matter of law that the undisputed facts as found by this court were sufficient to make out Morro's *prima facie* case. When the City took its appeal it had every factual or legal basis for a *Monell* defense that it had when it later moved for a dismissal under Rule 50(a). There is no escaping the conclusion that the existence of a *prima facie* case became the law of the case at the moment defendants' permitted appeal was dismissed. An appeal is nothing more than a complaint addressed to an appellate court. When such a complaint is dismissed with prejudice, the preclusive effect is identical to that occasioned by the dismissal by a *nisi prius* court of an action in that court.

After the dismissal of defendants' second appeal, the case came on for jury trial, during which the evidence consisted of everything that could easily be predicted, that is, except for testimony by Morro of forms of harassment that continued after the Personnel Board's ruling in his favor. There were no real surprises. Consistent with the pleadings and the pre-trial order, defendants made no contention during opening statement, or by any offer of evidence, either (1) that as a matter of police governance Morro could be summarily disciplined for attending a public trial, or (2) that the Chief was not the *alter ego* of the City, or, in other words, that the Chief was not the City's ultimate decisionmaker insofar as administering discipline

to police personnel. Before the case went to the jury, the City and the Chief agreed to Morro's dismissal of his action as against the Chief in his official capacity. This move came after a colloquy with the court, during which the court, and, ostensibly, counsel for Morro, were given every reason to believe that the City was reaffirming its concession that the Chief *was*, for all intents and purposes, the City for the purpose of establishing its § 1983 liability, that is, if the jury chose to believe that the Chief intended to punish Morro for attending the trial of Ms. Arrington. Neither a *Monell* defense nor a *Mt. Healthy* defense was ever a real issue, and no jury instruction was given as to either of them. The Chief was quite properly dismissed as a redundant defendant.

There was ample evidence of a motive by the Chief to punish Morro as a means of stopping a potential rank-and-file protest against the Chief and the Mayor in the Erica Arrington affair. Morro had a plausible explanation for his being "unprepared" in City court. His explanation, as has already been pointed out, was apparently accepted both by the Personnel Board and by the jury, which rendered a verdict in favor of Morro and against the City for $150,000.00, necessarily representing a finding that Morro proximately sustained substantial injury in the form of mental anguish. The City does not claim that this sum is excessive.

Not only was there evidence upon which the Chief's articulated motivation could be questioned, but even after Morro's exoneration by the Personnel Board, Morro's job assignments have been such as to suggest that he continues to be disparately treated by the "powers-that-be" within the Police Department. For instance, Morro still answers to the sergeant who, by appointment of the Chief, vigorously conducted the investigation of Morro's alleged "unpreparedness," and who, in effect, prosecuted him at the hearing before the Chief, and who was the chief witness against him before the Personnel Board and before the

jury. Morro has even been forced to undergo psychiatric counseling, which he may or may not have needed.

When Morro rested his case-in-chief, defendants filed a motion for judgment as a matter of law pursuant to Rule 50(a), F.R.Civ.P. Defendants did not argue that there had been insufficient evidence introduced to support plaintiff's proposition that the Chief was the final decision-maker for the City for the purposes of satisfying *Monell* and establishing municipal liability. Had defendants made such an argument at that time, the court (1) *might* have held that defendants were precluded by judicial estoppel or by Rule 16(e) and the pre-trial order, (2) *might* have allowed Morro to reopen, or (3) *might* have undertaken legal research that had not therefore been undertaken because the court had not been presented with a need to do so. The court denied the said Rule 50(a) motion, finding that Morro had made out his *prima facie* case, and that a reasonable jury, with the responsibility for factfinding and for making credibility determinations, had before it ample evidence, including implicit concessions, upon which it could find for Morro by finding that the Chief was the City's decision-maker and transgressed the First Amendment guarantee of freedom of expression.

The evidence subsequently offered by defendants can fairly be described as being equally supportive of plaintiff's allegations and of defendants' defense of a legitimate, reasonable, constitutional reason for having disciplined Morro. Defendants not only abandoned their *Mt. Healthy* defense, but never offered any evidence in support of a *Monell* defense. It was only *after* Morro dismissed his action as against the Chief and *after* the court had orally announced its intention to deny the City's final Rule 50(a) motion that the City insisted on arguing a *Monell* defense. As the court was about to charge the jury, the City, for the first time, sought to insist that the Chief was not the final arbiter of police discipline, and instead that the Personnel Board was that final arbiter, thus mounting a

Monell defense. The City was suddenly, at the last minute, arguing either that the Personnel Board (which had agreed with Morro) should be Morro's target, or that he had no § 1983 remedy whatsoever.

After the jury rendered its verdict and judgment was entered against the City, the court expressly reserved the right to expand upon its orally stated reasons for denying the City's Rule 50(a) motion. The City then filed its current motion for judgment pursuant to Rule 50(b), arguing several grounds, including the repeated contention that the Chief did not have binding authority for § 1983 purposes, but perhaps that the Mayor did, if not the Personnel Board. If at trial the City had contended that the Mayor constituted the City's final decider in the premises, as it now suggests for the first time, the can of worms would have overflowed. The interrelationships between the Mayor, his daughter, the Chief, and the City judge appointed by the Mayor would have made for a more interesting jury case than even this one was. In fact, there was no evidence whatsoever to suggest that the Mayor participated in the decision to discipline Morro, or that he had the authority to do so. There was, of course, the law, and a belated argument based on that law, that the Personnel Board was the final arbiter of police discipline. When that argument first surfaced just before closing arguments, this court pointed out that to allow the City, as an absolute defense, to rely upon the fact that a disciplined policeman can appeal to the Personnel Board would create impenetrable insulation for a Chief's purposeful violation of the constitutional right of a policeman, no matter how egregious that violation, and would render 42 U.S.C. § 1983 meaningless under circumstances like these.

Furthermore, the Personnel Board is an entity entirely separate from the City. It has responsibilities for personnel matters involving many other municipalities within Jefferson County, as well as for Jefferson County itself. Even more important is the law of Alabama that distin-

guishes the way the Personnel Board of Jefferson County operates from the way other personnel boards in Alabama, Florida and Georgia operate. Section 22 of Act No. 2482 of the Legislature of Alabama of 1945 (a general act of local application to Jefferson County), as amended by Act No. 562 of the Legislature of Alabama of 1947, by Act No. 670 of the Legislature of Alabama of 1953, by Act No. 1600 of the Legislature of Alabama of 1971, and by Act No. 679 of the Legislature of Alabama of 1977, provides:

> *Dismissal, Demotions and Suspension.* An appointing authority may dismiss or demote an employee holding permanent status for just cause whenever he considers the good of the service will be served thereby, for reason stated in writing, served on the affected employee, and a copy furnished to the Director, which action shall become a public record. The dismissed or demoted employee may within ten days after notice, appeal from the action of the appointing authority by filing with the Board and the appointing authority a written answer to the charges. The Board must order a public hearing of such charges, and if the Board finds the employee not guilty, the Board shall order the reinstatement of the employee under such conditions as the Board may determine. If the Board finds the employee guilty, the Board shall determine whether the employee shall be dismissed, demoted, suspended, or otherwise disciplined. In addition to removal or demotion by an appointing authority, an employee may be removed, demoted, suspended or otherwise disciplined in the following manner. Charges may be filed by any officer, citizen or taxpayer of the State with the Director who shall within five days cause a copy to be served upon the person complained against and shall set a day not more than twenty days after such charges have been served on such employee for a public hear-

ing of such charges. This hearing may be before the Director, a special agent appointed for the purpose by the Director, or the Board itself. If before the Director or a special agent, the Director or special agent shall take testimony offered in support and denial of such charges and from the same submit to the Board, within five days, a finding of facts and law involved and a recommended decision. The Board at its next regular or special meeting shall consider said report and modify, alter, set aside or affirm said report and certify its findings to the appointing authority who shall forthwith put the same into effect. If the Board hears said charges directly or requires the transcribing and submission of the testimony taken before the Director or special agent, it shall make up and file its own findings and decision. An employee may also be removed, demoted, suspended or otherwise disciplined upon charges made by the Director and referred to the Board based upon investigation conducted upon his own initiative or upon complaints referred to the Director by a member of the Personnel Board when the Director after such investigation shall be reasonably satisfied that such charges are warranted. Charges preferred by the Director shall be served and a public hearing held by the Board within the time and in the manner prescribed where charges are preferred by an officer, citizen or taxpayer of this State. Any interested party at such hearing may be represented by counsel. All proceedings at the hearing shall be recorded by a competent stenographer or mechanical recording device. *The decision of the Board based upon all proceedings before the Board shall be final subject to appeal by either party to the Circuit Court to review questions of law and the question of whether or not the decision or order of the Board is supported by the substantial and legal evidence.* On such appeal the Circuit Court shall review the record and shall

affirm, reverse, remand or render said cause. The decision of the Board shall be controlling until reversed on appeal as provided for herein. *The appeal shall be perfected by filing with the Director of Personnel a statement in writing signed by the party appealing to the effect that said party appeals from the decision or order of the Personnel Board to the Circuit Court, which statement shall be filed within ten days from the announcement of the decision or order of the Personnel Board; provided further, that the party taking an appeal shall file with the Clerk of the Circuit Court, security for costs in an amount approved by any judge or said Circuit Court, which security for cost may consist of a cash deposit or a bond executed by such party appellant and a surety or sureties approved by the said Circuit Clerk.* Such security for costs shall be filed by the party taking the appeal within ten days from the announcement of the decision or order of the Personnel Board. Within ten days from the filing of such statement of appeal the Director of Personnel shall forward to the Circuit Clerk the original or copies of charges preferred and the answer filed to such charges and a complete transcript of all the proceedings before the Personnel Board at such hearing. In the event the Director is unable to complete such transcript of all the proceedings within ten days, the Presiding Judge of the Circuit Court shall allow the Director such additional time as may be necessary to do so. In the event copies of said charges and answer are forwarded to the Circuit Clerk instead of the originals, the Director of Personnel shall certify that such copies are true and correct copies of the originals. The Personnel Board shall make no charge for furnishing the copy of the record required by the Circuit Court.

Upon receipt of said papers the Circuit Clerk shall present the same to the Presiding Judge of the Cir-

cuit Court or the Circuit Judge sitting in place of the Presiding Judge if the regular Presiding Judge be absent; and the Presiding Judge or the Judge sitting in his absence shall assign the case so appealed to three Circuit Judges of said Circuit who shall jointly review the record of the hearing before the Personnel Board. The Presiding Judge or the Judge sitting in his absence in the order assigning such case for review shall designate one of the three Judges to whom the case is assigned as Presiding Judge of such panel. Any such appeal shall be considered and determined as a preferred case in the Circuit Court. The opinion of a majority of three judges to whom such case is assigned shall be determinative of the case and there shall be no appeal to any appellate court of Alabama. The cost of said appeal shall be taxed against the unsuccessful party. If any employee shall wilfully refuse or fail to appear before any Board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or answer any question relating to the affairs of government or the conduct of any officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify and shall not be eligible for appointment to any position under the jurisdiction of this Act. An appointing authority may, from time to time, peremptorily suspend any employee without pay or other compensation, and without the right of a hearing, as punishment for improper behavior, but any one suspension shall not exceed five days and the total suspension by such appointing authority of such person shall not exceed ten days in any year of service. Such suspension with loss of pay may be effected only by service upon the employee by the appointing authority of written charges setting

> out clearly the delinquency for which such suspension was made, a copy of which must be at the same time mailed or delivered to the Director. The suspended employee shall have the right to file with the Board and the appointing authority a written answer or explanation of such charges. Any employee suspended without right to a hearing before the Board may obtain a review of his or her suspension by the appointing authority by filing with the appointing authority not more than ten days thereafter a written answer to such charges and a request for such review. A hearing shall be held thereon not more than twenty days thereafter to determine whether such suspension should be rescinded. At any such hearing such employee may be represented by counsel and present relevant testimony. The appointing authority may authorize a representative to conduct such hearing and submit within five days thereafter a finding of facts and law together with recommendations to the appointing authority. Within a period of ten days after such hearing the appointing authority may rescind all or any part of such suspension. A suspended employee shall be entitled to full salary for any period of suspension rescinded hereunder.

(emphasis supplied). Not only did Morro have a right to appeal to a three-judge court if the Personnel Board had decided against him, but despite the provision in Section 22 to the contrary, there would have been a limited review of the three-judge panel's decision to the Court of Civil Appeals of Alabama. *See Ex parte Personnel Bd. of Jefferson County*, 440 So.2d 1106 (Ala.Civ.App.1983). In other words, if the employee victim of a constitutional tort in the form of wrongfully administered discipline is limited to a § 1983 complaint against the ultimate possible decider on the matter of discipline, a § 1983 defendant in cases arising in Jefferson County would have to be the Circuit Court of Jefferson County (or a three-judge panel

thereof), or the Court of Civil Appeals. This is far from what § 1983 intended.

At the late stage at which the City attempted to raise *Monell*, it was judicially estopped from contending that the Chief was not lawfully assigned the binding responsibility for administering discipline within his Department. In its above-quoted second motion for summary judgment, the City plainly said:

> Defendant Deutcsh was at the time of his decision to impose discipline upon the plaintiff the Chief of the Birmingham Police Department. As such he was entitled to and obligated to discipline employees of the department such as plaintiff. . . .

If this court or plaintiff's counsel had been seriously faced earlier with a contention by the City that the Chief's authority did not provide Morro his way around *Monell*, the court would not only have more carefully studied *Pembaur* and *Praprotnik* but would have carefully read *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), and would certainly have discovered *Hill v. Clifton*, 74 F.3d 1150 (11th Cir.1996), decided only a month before the instant case went to trial. The City did not even mention *Hill v. Clifton* until its post-judgment motion.

An excellent, and still valid, statement of the principle of judicial estoppel is found in *Texas Co. v. Gulf Refining Co.*, 26 F.2d 394, 397 (5th Cir.1928), *cert. denied*, 278 U.S. 625, 49 S.Ct. 27, 73 L.Ed. 545 (1928), as follows:

> A party, who in litigation with his adversary has, with knowledge of the facts, asserted a particular claim, title, or right, cannot afterward assume a position inconsistent with such claim, to the prejudice of the same adversary, who has acted in reliance on such claim being as it was previously made; in other words, a party who, for the purpose of maintaining

> his position in litigation, has deliberately represented a thing in one respect, is estopped to contradict his own representation by giving the same thing another aspect in litigation with the same adversary as to the same subject-matter. *Ohio & Miss. Ry. Co. v. McCarthy*, 96 U.S. [(6 Otto)] 258, 24 L.Ed. 693 [(1877)].
>
> * * * *
>
> From the beginning appellant had knowledge of the facts upon which it bases the claim asserted in this suit. Notwithstanding its possession of that knowledge, for more than nine years it refrained from making the claim now asserted, in the meantime so conducting itself as to conceal from appellee even the probability or possibility of such a claim being made. . . .

While the City in the instant case did not conceal its *Monell* defense for nine years as was done in *Texas Co.*, the City did successfully conceal it for four years. In the instant case there was no reason or inducement for Morro to develop or to present evidence to support his *Pembaur* or *Praprotnik* theory. Thus, the city created the basis for judicial estoppel.

Rule 16(e), F.R.Civ.P., provides that the final pretrial order "shall control the subsequent course of the action unless modified by subsequent order," and that that order "shall be modified only to prevent manifest injustice." The City never requested a modification of the pretrial order to inject a *Monell* defense. This procedural fact renders academic the question of whether the court could have made such a modification at the last minute without *causing* manifest injustice in contrast to *preventing* it.

Assuming *arguendo* (1) that the City is not estopped by its implicit concession that the Chief had the City's final policymaking power as to the subject at hand; and

(2) that the issue of the Chief's authority was not finally adjudicated against the City by the dismissal with prejudice of its most recent appeal to the Eleventh Circuit, the *Monell* question is still answered in favor of Morro by the evidence. First, the apparent reason for bringing up for the first time the Mayor as the final policymaker vis-a-vis Morro is to try to bring this case in alignment with the very recent decision of *Hill v. Clifton.* There, the city manager and not the police chief was found to have final authority to take disciplinary action against police personnel, thus heading off the *Pembaur* and *Praprotnik* approach. As distinguished from *Hill v. Clifton,* there was no evidence whatsoever in the instant case that the City's Mayor could have disciplined Morro. If the Mayor participated in the decision, that participation remains undiscovered, and the court finds no reason whatsoever to think that the Mayor was ever anything but a chagrined and interested father. Furthermore, the City overlooks or misstates the Personnel Board's role as an actor. The Personnel Board of Jefferson County is not an actor, but a reactor. The actor was Chief Deutcsh. The existence of the Personnel Board as a means of review only provided Morro an expanded opportunity to obtain "due process." He is not complaining of a denial of "due process." If the fact that the Personnel Board had the right to overrule the Chief makes the Personnel Board the *Monell* policymaker for the City, the City overlooks, either deliberately or mistakenly, the significant differences between *this* personnel board and *other* personnel boards within the territorial jurisdiction of the Eleventh Circuit. Lastly, the City by credible evidence of continued disparate treatment of Morro, arguably ratified and confirmed the Chief's adverse employment decision, reversed though it was by the Personnel Board. Perhaps the City was retaliating against the Personnel Board as well as against Morro. The Personnel Board is an entity which the City admits it doesn't care for.

In addition to published opinions, the City cites the unpublished opinion of Hon. Robert B. Propst of this court in *Bohakel v. City of Birmingham*, CV 90-PT-1834-S, affirmed by the Eleventh Circuit without opinion. Judge Propst's opinion, although not binding, might well be persuasive if it were not for the fact that the Bahakel case was markedly different from the Morro case in several important respects. Those crucial distinctions need not be explored here.

The City's Attack on the Jury Venire

When the venire appeared for the selection of seven civil jurors for the trial of this case, the venire consisted of eighteen white venirepersons. Defendants complained about the absence of black venirepersons, but the court proceeded with jury selection. Defendants adequately preserved their objection to the venire.

Even before the filing of the City's current Rule 50(b) motion, the court undertook its own investigation into the matter of the venire composition. The court consulted with the jury section of the Clerk's office and with other members of the court and arrived at the same explanation for the racial makeup of this particular venire as can be deduced from the City's motion. In solving one problem *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), created another. This venire was randomly drawn for this court's one case mid-month civil docket to start on March 18, 1996. The venire came from the "leftovers" from a much larger venire summoned for jury duty to commence at the beginning of the month on March 4, 1996, and designed to accommodate the jury needs in several criminal and civil trials before various judges.

It quickly becomes apparent that the juries actually empaneled in the Northern District of Alabama at the first of the month, by the exercise of so-called "preemptory"

challenges, contain a higher percentage of black jurors than the original venire as a whole. This fact strongly suggests that *Batson* acts as a brake on the striking of black venirepersons, and has the indirect effect of leaving the remaining pool with a higher percentage of whites and a lower percentage of blacks than were in the original, total venire. In other words, by the middle of the month, the black jurors have been disproportionately "used up" as a proximate consequence of *Batson*. This court's research has not led it to a solution of this problem, if it is a problem, or to any case law which would render unconstitutional or illegal this court's present system of jury selection. It would be enormously expensive, and perhaps unconstitutional, to randomly select from 31 north Alabama counties a separate venire for each and every specific jury case. The court can conceive of no other method that would come close to assuring an apportional racial representation in every venire.

Although *Batson* itself was not invoked in this case, except perhaps in an indirect way, *Batson* and its progeny are as much designed to protect potential jurors from disparate treatment as to guarantee litigants a racially or gender balanced jury. Therefore, if the local media correctly reports that the Mayor was not surprised by the verdict in this case against the City "from an all white jury," the Mayor is only exercising his freedom of expression, just as the jury found Morro to be doing. The Supreme Court in *Batson* would not agree with the Mayor as to what can be expected from an all-white jury, because it there said:

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen *on the assumption that they will be biased* in a particular case simply because the defendant is

> black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors *on the basis of such assumptions*, which arise solely from the jurors' race.

476 U.S. at 98, 106 S.Ct. at 1724 (emphasis supplied) (citation omitted). This expression can only mean that the Supreme Court believes, as this court does, that jurors of whatever race are presumed to be free of race prejudice, especially when they are instruced that prejudice can play no part in their deliberations.

It might also be worth noting that Chief Deutcsh, like Morro, is white, that Morro's fellow arresting officer, who was called as a witness by the City but whose testimony was more favorable to Morro than to the City, is black, and that the police sergeant who investigated Morro, who testified against him and who now supervises him, is white. In fact, the testimony from the present Chief, who is black, was not particularly flattering to former Chief Deutcsh. This court could not detect any racial bias in a very attentive jury.

The City's Last-Minute Proffer of a Newly Found Witness

The sergeant who investigated Morro, who testified against him before the Chief, before the Personnel Board and before the jury, and who now supervises him, during the trial suddenly found an alleged witness who the City said could contradict Morro's denial of an intent to join in a police conspiracy of silence against the City judge who had found Ms. Arrington "not guilty." Morro's case has been pending since 1992. Morro has testified on several occasions, including before the Personnel Board hearing officer. He has been consistent in denying any deliberate avoidance of duty. The final pre-trial order required the listing of witnesses. To have allowed an unlisted and

still unnamed witness to testify for the City after Morro rested would have been unfair, prejudicial, and prolonging. The sustaining of Morro's objection to such a witness was well within the court's discretion granted by Rule 16(e), F.R.Civ.P., and Rule 403, F.R.E.

Conclusion

All of the City's arguments worthy of response have, in this court's opinion, been responded to. There is no purpose to be served by saying what this court would have done at a bench trial of this case. This was a jury case tried by a jury peculiarly equipped to make credibility assessments on conflicting evidence, and the jury discharged its responsibility. For that reason, the City's post-judgment motion will be denied by separate order.

ADDENDUM TO MEMORANDUM
OPINION OF APRIL 12, 1996

Whether it is called "judicial estoppel," or by some other name, a good statement of the principle which, in this court's opinion, precluded the City's last minute reliance on a *Monell* argument, is found in *In the Matter of Linda Coal and Supply Co.*, 255 F.2d 653 (3d Cir. 1958), in which the Third Circuit held:

> [T]he reason for holding a litigant to his announced theory becomes more compelling as the litigation proceeds to advanced stages. And the desirability of seeing an end to litigation would still call for application of the general rule for so confining a litigant if either the petition or the evidence are not permeated with the alternative theory which is now fully spelled out for the first time at this late date.

The First Circuit adopted the Third Circuit's reasoning as follows in *Wallace Motor Sales v. American Motors Sales Corp.*, 780 F.2d 1049, 1067 (1st Cir.1986):

> In *In Re Linda Coal and Supply Co.*, 255 F.2d 653 (3d Cir.1958), the Third Circuit addressed a similar situation where appellant claimed a theory on appeal which was not raised at trial but had been raised in the pleadings. In that case, the court refused to consider the alternative theory "which at best was raised only inferentially in the pleadings," *id.* at 656, and held that if neither the pleadings nor the evidence at trial were "permeated" with the alternative theory, it could not be raised on appeal. We adopt the reasoning of the Third Circuit.

The foregoing shall be considered an addendum to the memorandum opinion of April 12, 1996.

APPENDIX C

[Filed Sep. 15, 1997]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6445

SCOTT THOMAS MORRO,
Plaintiff-Appellee,

versus

CITY OF BIRMINGHAM,
a Municipal Corporation,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: CARNES, Circuit Judge, and HENDERSON and GIBSON *, Senior Circuit Judges.

PER CURIAM:

---

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. L. Carnes
United States Circuit Judge

APPENDIX D

[Filed Oct. 26, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,
Plaintiff,

VS.

CITY OF BIRMINGHAM,
a Municipal Corporation and
ARTHUR DEUTCSH,
Individually and in his Official Capacity,
Defendants.

MOTION TO DISMISS

Comes now the City of Birmingham, a Municipal Corporation, and Arthur Deutcsh, both individually and in his Official Capacity, by and through their Attorney, and moves the Court to enter an Order of Dismissal of the action filed against the above-styled Defendants, and as grounds for this motion shows the following:

(1) Plaintiff's Complaint fails to state a claim against these Defendants upon which relief may be granted.

(2) The complaint consists of vague allegations which are not supported by specific factual allegations against any of the defendants and therefore constitute no basis for a § 1983 cause of action. *Oladeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir.1992); *Arnold v.*

Board of Educ. of Escambia County, Ala., 880 F.2d 305 (11th Cir. 1989).

(3) The complaint fails to state any official policy, practice, or custom of the City of Birmingham which resulted in a violation of plaintiff's rights protected by the United States Constitution or the Constitution of the State of Alabama or the laws of the United States or the State of Alabama. *Monell v. New York City Department of Social Services*, 436 U.S. 658; 98 S.Ct. 2018 (1978).

(4) The complaint does not allege what associations of the plaintiff the defendants sought to interfere with or what public issues the defendants attempted to deter plaintiff from discussing.

(5) The complaint alleges that "plaintiff has been subjected to harassment and intimidation as a result of pursuing the said appeal". Nowhere in the complaint does plaintiff state what harassment occurred nor what acts of or by the defendants constituted intimidation.

(6) Plaintiff nowhere in the complaint denies the allegation that he was unprepared to prosecute the criminal case in question. Such unpreparedness forms a legitimate basis for the discipline imposed.

(7) Plaintiff alleges no conduct on the part of the defendants which shocks the conscience, therefore no substantive due process rights are implicated. Therefore no due process claim for which relief might be granted is stated. *Faucher v. Rodziewicz*, 891 F.2d 864 (11th Cir. 1990); *Oladeinde*, 963 F.2d at 1486.

Based upon the above and foregoing, Defendants, City of Birmingham and Arthur Deutcsh, individually and in his official capacity requests this Court Dismiss the Plaintiff's above-styled action.

/s/ John M. Edens
JOHN M. EDENS
State Bar I.D. 240-82-4643

/s/ Thomas Bentley, III
THOMAS BENTLEY, III
State Bar I.D. 419-76-0936
Attorneys for Defendants

City of Birmingham
Department of Law
600 City Hall
Birmingham, AL 35203
(205) 254-2369

[Filed Dec. 17, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 92-AR-2339-S

SCOTT MORRO,
Plaintiff,

vs.

CITY OF BIRMINGHAM,
a municipal corporation;
ARTHUR DEUTSCH, individually and
in his official capacity as Birmingham Chief of Police,
Defendant.

AMENDED COMPLAINT

Jurisdictional and Factual Allegations

1. Plaintiff brings this action for declaratory and injunctive relief and monetary damages for the violation of his rights under color of state law by defendants. Jurisdiction is pursuant to 42 U.S.C. 1983, and 28 U.S.C. 1343 and the Constitutions of the United States and the State of Alabama.

2. Plaintiff if over 19 years of age and a resident of Jefferson County, Alabama. The defendant City is a municipal corporation located in the Northern District of Alabama. Defendant Deutsch who was, at all times relevant, the duly appointed Police Chief of the City of Birmingham, and was the principal executive officer of the said department of the City Government. Defendant Deutsch is sued in his individual and official capacities.

3. Plaintiff, who is, and at all times relevant was, a police officer employed by the City of Birmingham. On or about October 9, 1990, plaintiff was suspended without pay for 30 days without pay. Defendants charged plaintiff with the following: "that on Monday, July 23, 1990, at approximately 6:00 p.m., [plaintiff] came to City Court (Judge Carole Smitherman) unprepared and unable to testify in a case in which [plaintiff] was an arresting officer."

4. Plaintiff appealed the said disciplinary action to the Personnel Board of Jefferson County, the public body having jurisdiction over the employees of the City of Birmingham. After consideration of plaintiff's appeal, the suspension was reversed in favor of plaintiff.

5. Defendant Deutsch instituted disciplinary action to punish plaintiff for attending a public trial and to deter plaintiff and other employees from associating or discussing matters of public concern. In particular, on or about the 20th day of July, 1990, plaintiff attended the misdemeanor trial of Erica Arrington, the daughter of the City's Mayor. The arresting officer, Jerry Bahakel, testified at the trial before Judge Smitherman. Many citizens, including plaintiff, were in attendance as Ms. Arrington's arrest was a matter of extreme public concern, involving extensive public debate and news coverage. Public statements, both in support of and against Bahakel, concerned issues of police brutality, favoritism being shown to persons associated with the Mayor, the alteration of public records, and the harassment and punishment of police officers who took public positions contrary to the City Administration. Defendant Deutsch was personally involved in the public furor due to widely publicized allegations that he directed the alteration and attempted destruction of public records of Ms. Arrington's arrest. These allegations against Deutsch, coupled with the suspension of Officer Bahakel and the ongoing investigation by the District Attorney's office which ultimately resulted in conviction of Deutsch, created a matter of public con-

cern which affected any officer perceived as a supporter of Bahakel.

6. On July 23, 1990, shortly after plaintiff's attendance at the trial of Erica Arrington, plaintiff was again in Court before City Judge Smitherman. On this occasion, plaintiff had been subpoenaed to offer testimony regarding the arrest of Benjamin Franklin, a case unrelated to the Arrington arrest. Officer Rodney Hall, plaintiff's partner, was present to testify as the arresting officer. Plaintiff advised the prosecuting attorney that although Hall listed plaintiff's name on the arrest report, plaintiff was not the arresting officer and did not presently recall the factual details of the Franklin arrest. Whereupon the prosecutor released the plaintiff to return home. Officer Hall remained and offered testimony which resulted in the conviction of this defendant for disorderly conduct. Although Judge Smitherman was aware that plaintiff conceded an inability to recollect details of the arrest made by his partner, she did not file a complaint with the Birmingham police against plaintiff.

7. Nonetheless, on August 24, 1990, plaintiff was interrogated by Internal Affairs (IAD) and repeatedly and falsely accused of being deliberately "unprepared" to testify in the July 23rd criminal case. Plaintiff was falsely accused of participating in a conspiracy to impede the judicial process. IAD accused plaintiff of being "angry" at Judge Smitherman for her role in dismissing the charges brought by Officer Bahakel against Erica Arrington. The IAD Officers warned plaintiff that "playing games with the Court could be very dangerous". The interrogation of plaintiff was conducted in an oppressive and accusatory manner as reflected in the excerpts of the interrogation attached hereto and incorporated herein as Exhibit "A". Thereafter, the department conducted other interviews of persons having involvement in the arrest incident and trial, including Judge Smitherman, prosecuting attorney, Pat Burns, and fellow Officer Rodney Hall. The information collected during the investigation failed to establish

the existence of any misconduct on the part of the plaintiff or the existence of a conspiracy.

8. Despite the lack of evidence, and based on conjecture, disciplinary charges were brought by defendant Deutsch against Morro on October 9, 1990. Plaintiff was suspended without pay for a period of 30 days. Plaintiff appealed this suspension and a hearing was held by the Personnel Board of Jefferson County. Although Judge Smitherman never filed a complaint against plaintiff with IAD, she was questioned about plaintiff's inability to assist with the Franklin trial. At the Personnel Board hearing, Judge Smitherman identified plaintiff as "officer of the year" and a front row "spectator" at the Arrington trial. During cross examination of plaintiff, the City Attorney focused, not on the Franklin trial, but rather on plaintiff's attendance of the Erica Arrington trial as a "spectator":

> City Attorney: So you decided not to attend as a spectator at the trial of Benjamin Franklin, correct?
>
> Morro: No sir, it is normal that when you go to Court you try to leave as soon as you can because you want to get home to your family or that sort of thing, because that is extra time.
>
> City Attorney: And if you are interested in some other trial you try to attend, such as the Arrington trial?
>
> Morro: Right. I was very interested in that.
>
> City Attorney: You would agree that you were more interested in the outcome of that trial than the outcome of Benjamin Franklin's.

Objection.

> Morro: Being the fact that I didn't remember the arrest, I didn't see where it was any interest to me at all.

City Attorney: Even though you were listed as assisting or being the partner of Rodney Hall.

Morro: That is why I asked Pat Burns and I told her I wanted to ask her before I left if there was anything I needed to do. She told me I could leave so I did. I didn't just do it and leave on my own.

City Attorney: Other than the Arrington trial have you attended any other trials as a spectator that is to find out whether or not there was a case or a report any other case.

Morro: No, I can't say as I have ever spectated on any other one.

City Attorney: You did not agree with the resolution or the outcome of the Arrington trial?

Objection, that is his business, his right, however he feels about it.

9. Plaintiff avers that defendant Deutsch, acting individually and as a policy maker for the City of Birmingham, intentionally and maliciously sought to punish plaintiff for his association with and attendance of the trial of Erica Arrington. Moreover, Deutsch was motivated by the desire to intimidate others within the department from association with Bahakel or otherwise engaging in speech, conduct or assemblage relating to the arrest or trial of Arrington or the related records tampering activities of Deutsch.

10. During the appeal of the charges brought against him and thereafter, plaintiff was subjected to harassment, abuse and discriminatory treatment. Plaintiff avers that he was denied shift preferences and placed under greater scrutiny regarding his productivity. Plaintiff avers further that defendants denied him the opportunity to schedule his off days consistent with the privileges afforded police officers with comparable seniority. Plaintiff avers further that while under the supervision of Sgt. Jake Baley, he

was subjected to extreme scrutiny and unwarranted verbal criticism. On or about April 1991, Bailey warned plaintiff that "you can't live with the 4th of July forever", referring to the arrest of Erica Arrington.

11. At the hearing before the Personnel Board, it was clear that defendants were punishing plaintiff for his association and attendance at the Arrington trial. The focus of the City's case was clearly not upon whether or not plaintiff came "unprepared" to the July 23rd trial of a disorderly citizen, but rather to punish plaintiff for attending the Erica Arrington trial. The City Attorney's pre-occupation with plaintiff's attendance of the Arrington trial precipitated not only the IAD investigation of plaintiff but also the suspension which was later ordered by defendant Deutsch. Defendants knew following the IAD investigations that this allegation of "selective amnesia" was without foundation, but proceeded to punish plaintiff by suspending him.

COUNT I

First Amendment Claims

12. Plaintiff adopts and realleges paragraphs 1 through 11 as if fully set forth herein.

13. Plaintiff avers that the acts and conduct of the Chief, acting individually and as an official policy maker of the City, denied the plaintiff his constitutional rights of free speech and freedom of assembly by directing and issuing a disciplinary suspension (Exhibit B) which was motivated by and a direct result of plaintiff's attendance at the trial of Arrington.

14. Plaintiff avers that plaintiff was subjected to disparate treatment through the discriminatory enforcement of rules and regulations of the Department, harassment, abuse, and other retaliatory conduct on the part of the defendants, separately and severally, occurring during the

investigation and appeal of the unfounded charges brought against plaintiff: to-wit, plaintiff was falsely accused of deliberately impeding judicial process, abused during the interrogation process, suspended for pretextual reasons, and suffiered discriminatory enforcement of Department Rules and Regulations pertaining to preparedness for court. All such actions were done for the purpose of punishing or inhibiting plaintiff's constitutional right of free speech to attend a public trial and freedom of assembly.

15. As a direct and proximate consequence of the denial of plaintiff's First Amendment rights, plaintiff suffered economic loss which was not recompensed by his reinstatement as an officer following the successful appeal of the unfounded charges, and has further suffered mental anguish, emotional distress, and claims all compensatory damages allowable under 42 U.S.C. Section 1983. Plaintiff further avers that the acts and conduct of the defendant Deutsch, acting individually and as official policy maker of the City, were deliberate, oppressive, and malicious, for which plaintiff claims punitive damages.

WHEREFORE, premises considered, plaintiff demands judgment against the defendants, separately and severally, in an amount exceeding $500,000.00 plus costs, attorney's fees, interest, and all such other sums as are permitted under the law.

COUNT II

Due Process

16. Plaintiff adopts and realleges paragraphs 1 through 15 as if fully set forth herein.

17. Plaintiff avers that the acts and conduct of defendant Deutcsh, acting individually and as official policy maker of the City of Birmingham, as hereinabove alleged, were done arbitrarily, capriciously, and irrationally and done with the intent and purpose to intimidate and harass

plaintiff for engaging in constitutionally protected activities and together and separately constitute a violation of plaintiff's substantive due process rights.

18. Plaintiff's procedural due process rights have been violated by defendants in denying plaintiff a fair and impartial investigation and in the defendants' use and employment of the investigation procedures as a means of intimidating, coercing, and otherwise retaliating against plaintiff for his exercise of First Amendment rights including the right of free speech, freedom of assemblage, and right to petition for redress of violations of his rights.

19. Plaintiff avers that the actions of the defendants were done intentionally and maliciously and with knowledge or reckless indifference to the consequences, including the fact that plaintiff would suffer economic harm and emotional distress, so that punitive damages are proper.

WHEREFORE, premises considered, plaintiff demands judgment against the defendants, separately and severally, in an amount exceeding $500,000.00 plus costs, attorney's fees, interest, and all such other sums as are permitted under the law.

COUNT III

State Law Due Process Claim

20. Plaintiff adopts and realleges paragraphs 1-19 as if fully set forth herein.

21. Plaintiff claims a violation of state constitutional rights as provided by Article I, Section 13 of the Constitution of Alabama, 1901, which provides:

> "That all courts shall be open; that every person, for any injury done him in his lands, goods, person, reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

22. Plaintiff avers that the defendants, by and through their arbitrary, capricious, and irrational acts and conduct as hereinabove alleged, denied plaintiff his substantive due process rights as established under Alabama law and judicial authority, to-wit: *City of Birmingham v. Community Fire District*, 336 So.2d 502 (Ala. 1976).

23. Plaintiff avers that the actions of the defendants were done intentionally and maliciously with knowledge or reckless indifference to the consequences, including the fact that plaintiff would suffer economic harm and emotional distress, so that punitive damages are proper.

24. The acts and conduct of the defendants as hereinabove alleged have violated the rights of the plaintiff as are guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. Additionally, they violate the rights of the plaintiff guaranteed by the Constitution of the State of Alabama.

WHEREFORE, THE PREMISES CONSIDERED, plaintiff seeks the following relief:

A. Appropriate declaratory and injunctive relief against defendants, whereby defendants are enjoined from taking further action in violation of plaintiff's rights.

B. Appropriate monetary damages, compensating plaintiff for all damages as a result of the violation of plaintiff's rights. Plaintiff further seeks actual and punitive damages against defendants.

D. All costs of this action, including reasonable attorneys' fees.

E. Any other and different relief to which plaintiff may be entitled.

/s/ M. Clay Ragsdale
M. CLAY RAGSDALE
Bar No. 422-88-0594
Farley Building, Suite 550
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(205) 251-4775

PLAINTIFF DEMANDS TRIAL BY JURY.

/s/ M. Clay Ragsdale
M. CLAY RAGSDALE

[Filed Jan. 12, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT THOMAS MORRO,
Plaintiff,

VS.

CITY OF BIRMINGHAM, AL.,
A Municipal Corporation, and
ARTHUR DEUTCSH, individually and
in his capacity as
Chief of Police of the City of Birmingham,
Defendants.

ANSWER

Comes now the Defendants, City of Birmingham, a municipal corporation under the laws of the State of Alabama, and Arthur Deutcsh, Individually and in his Official Capacity as Chief of Police of the City of Birmingham, and as Answer to the Amended Complaint filed in the above-styled cause state the following:

1. Defendants deny that the jurisdiction of this Court has been properly invoked.

2. Defendants admit the averments of Paragraph Two except as to whether defendant Deutcsh was, at all times relevant to this matter, the Chief of Police and deny that he can be sued in that official capacity.

3. Defendants deny the averments of Paragraph Three of the Amended Complaint.

4. Defendants admit the averments of Paragraph Four of the Amended Complaint.

5. Defendants admit that Plaintiff was disciplined for being unprepared to prosecute a criminal case in Birmingham Municipal Court. Defendants deny Plaintiff's allegation that he was punished for attending a public trial or that Plaintiff was punished in order to deter anyone from discussing matters of public concern.

6. Defendants deny the material allegations of Paragraph Six of the Amended Complaint.

7. Defendants deny the material allegations of Paragraph Seven of the Amended Complaint.

8. Defendants deny the material allegations set out in Paragraph Eight of the Amended Complaint. Defendants admit that Plaintiff was suspended for a period of thirty (30) days.

9. Defendants deny the material allegations set out in Paragraph Nine of the Amended Complaint.

10. Defendants deny the material allegations set out in Paragraph Ten of the Amended Complaint.

11. Defendants deny the material allegations set out in Paragraph Eleven of the Amended Complaint.

12. Defendants restate and adopt, as if fully stated herein, the responses, denials and admissions previously stated regarding the material allegations contained in Paragraphs One through Eleven of the Amended Complaint.

13. Defendants deny the material allegations set out in Paragraph Twelve of the Amended Complaint.

14. Defendants deny the material allegations set out in Paragraph Fourteen of the Amended Complaint.

15. Defendants deny the material allegations set out in Paragraph Fifteen of the Amended Complaint.

16. Defendants restate and adopt, as if fully stated herein, the responses, denials and admissions previously stated regarding the material allegations of Paragraphs One through Fifteen of the Amended Complaint.

17. Defendants deny the material allegations set out in Paragraph Seventeen of the Amended Complaint.

18. Defendants deny the material allegations set out in Paragraph Eighteen of the Amended Complaint.

19. Defendants deny the material allegations set out in Paragraph Nineteen of the Amended Complaint.

20. Defendants restate and adopt, as if fully stated herein, the responses, denials and admissions previously stated regarding the material allegations of Paragraphs One through Nineteen of the Amended Complaint.

21. Defendants deny the material allegations set out in Paragraph Twenty-One of the Amended Complaint.

22. Defendants deny the material allegations set out in Paragraph Twenty-Two of the Amended Complaint.

23. Defendants deny the material allegations set out in Paragraph Twenty-Three of the Amended Complaint.

24. Defendants deny the material allegations set out in Paragraph Twenty-Four of the Amended Complaint.

25. Defendants deny that Plaintiff is entitled to any of the relief he has requested.

AFFIRMATIVE DEFENSES

26. Defendants aver that the Plaintiff fails to state a claim for which relief can be granted.

27. Defendants aver that, under the circumstances presented, in spite of any other factors relating to Scott Morro's employment, the Defendants would have taken the same action regarding his employment, and specifically invoke the *Mt. Healthy* defense.

28. Defendants aver that all of its actions with respect to the employment of Scott Morro were made on the basis of rational factors and were not a pretext, nor were they arbitrary or capricious, nor for any unconstitutional purpose.

29. To the extent that the complaint alleges a claim against the City of Birmingham for punitive damages, the City contends that such claim is barred by the holding in *City of Newport v. Facts Concerts,* 453 U.S. 247 (1981).

30. Defendants aver that all actions taken by it in regard to the Plaintiff's employment were necessary for the effective operation and management of the defendant's business.

31. Plaintiff fails to state a claim against the Defendant, the City of Birmingham, for which he is entitled to relief.

32. Defendant, Arthur Deutcsh, raises the defense of Qualified Immunity.

/s/ Demetrius Newton
DEMETRIUS NEWTON
City Attorney
State Bar # 416-32-9763

/s/ John M. Edens
JOHN M. EDENS
Assistant City Attorney
State Bar # 240-82-4643

/s/ Thomas Bentley, III
THOMAS BENTLEY, III
Assistant City Attorney
State Bar # 419-72-4055

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[Filed Apr. 20, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action Number: CV 92-AR-2339-S

SCOTT THOMAS MORRO,
Plaintiff,

vs.

CITY OF BIRMINGHAM, *et al.*,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendants, the City of Birmingham, a municipal corporation, and Arthur Deutcsh, sued both individually and in his official capacity as Chief of Police of the City of Birmingham, and in support of this motion, Defendants show the following:

DEFENDANT CITY OF BIRMINGHAM

1. The complaint fails to state a claim against Defendant City of Birmingham for which the plaintiff is entitled to relief.

2. Plaintiff's complaint against Defendant City of Birmingham fails to allege a "policy or practice" of the City of Birmingham, to violate plaintiff's or others' constitutional rights.

3. The plaintiff's basis for liability against Defendant, City of Birmingham, is predicated solely on the doctrine of "Respondeat Superior". This may not form the basis for the liability of a municipality under 42 USC § 1983.

DEFENDANT ARTHUR DEUTCSH

1. The complaint fails to state a claim against Defendant, Arthur Deutcsh, for which the plaintiff is entitled to relief.

2. Defendant, Arthur Deutcsh is sued in both his "individual" and "official" capacities. The basis for the "Official capacity" claim is that at the time he made the employment decision regarding plaintiff, Defendant Deutcsh was the Chief of the Birmingham Police Department.

3. While Defendant Arthur Deutcsh is no longer the Chief of Police for the City of Birmingham, at the time Defendant Arthur Deutcsh made the employment decision regarding plaintiff, he was acting in that "official" capacity.

4. At that time, Defendant Arthur Deutcsh's conduct did not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982); *Herren v. Bowyer,* 850 F.2d 1543 (11th Cir.1988).

5. Defendant Arthur Deutcsh was a governmental official performing a "discretionary function", and in the performance of this discretionary function, Defendant Arthur Deutcsh is entitled to "qualified immunity" from suit, for decisions which are objectively reasonable. *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir.1991); *Fraire v. City of Arlington Heights,* 957 F.2d 1268 (5th Cir.1992).

6. The complaint is devoid of facts alleging violation of the plaintiff's constitutional rights by Defendant Arthur Deutcsh, while acting in his "individual" capacity.

WHEREFORE, PREMISES CONSIDERED, Defendants, the City of Birmingham and Arthur Deutcsh, sued

in his official and individual capacities, request that this Honorable Court enter a judgment in their favor and dismiss the suit filed against them.

Respectfully submitted,

/s/ John M. Edens
JOHN M. EDENS
State Bar I.D. #240-82-4643
Attorney for Defendants
600 City Hall
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(205) 254-2369

ORAL ARGUMENT REQUESTED

[Entered and Denied Aug. 20, 1993]

[Filed Apr. 20, 1993—Entered Apr. 20, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,

Plaintiff,

vs.

CITY OF BIRMINGHAM,
a Municipal Corporation and
ARTHUR DEUTCSH,
Individually and in his Official Capacity,

Defendants.

PRE-TRIAL ORDER

A pre-trial conference was held in the above case on Tuesday, April 20, 1993, wherein, or as a result of which, the following proceedings were held and action taken:

1. *Appearances.* Appearing at the conference were:

   Plaintiff: Clay Ragsdale

   Defendants: John Edens

2. *Jurisdiction and venue.* Jurisdiction exists pursuant to 28 U.S.C. Section 1331.

3. *Consolidation.* Not applicable.

4. *Parties and trial counsel.*

PARTIES	*TRIAL COUNSEL*
Plaintiffs:	
Scott Morro	M. Clay Ragsdale
Defendants:	
City of Birmingham	John Edens Thomas Bentley
Arthur Deutcsh	Mark White

5. *Pleadings.* The following pleadings have been allowed: Complaint (as amended) on behalf of the plaintiff; answer on behalf of the defendants to each complaint. The answers filed to the original complaint suffice as answers to the amended complaints without refiling.

6. *Statement of the case.*

(a) *Agreed summary.* Plaintiff is a police office employed by the City of Birmingham who, on October 9, 1990, was suspended without pay for thirty days. Plaintiff appealed the disciplinary action to the Personnel Board of Jefferson County which appeal was successful and the suspension was reversed.

(b) *Plaintiff's positions.* Plaintiff's positions are set forth in detail in the complaint which is adopted as if fully set forth herein. In summary, plaintiff contends that the disciplinary action instituted against him was for the purpose of punishing him for attending a public trial and to deter him and other employees from associating or discussing matters of public concern. Plaintiff avers that defendant Deutcsh, acting individually and as a policy maker for the City of Birmingham, intentionally and maliciously sought to punish the plaintiff for his association with and attendance at the trial of Erica Arrington.

Said conduct was motivated by the desire to intimidate others from association with Bahakel or otherwise engaging in speech, conduct, or assemblage, relating to the arrest or trial of Arrington or the related records tampering activities of Deutcshe.

(c) *Defendants' positions.*

(1) The defendants, the City of Birmingham and Arthur Deutcsh, deny each and every material allegation of plaintiff's complaint filed in this cause.

(2) The defendants raise, as an affirmative defense, the *Mt. Healthy* defense, in that in spite of any other factors relating to the plaintiff's employment, the defendants would have taken the same action regarding his employment.

(3) The defendants state that all of their actions with respect to the employment of plaintiff were made on the basis of rational factors and were not a pretext, nor were they arbitrary or capricious, nor for any unconstitutional purpose.

(4) The defendant, the City of Birmingham, states that to the extent that the complaint alleges a claim against it for punitive damages, the City of Birmingham contends that such claim is barred by the holding in *City of Newport v. Facts Concerts,* 453 U.S. 247 (1981).

(5) The defendants state that all actions taken by them in regard to plaintiff's employment were necessary for the effective operation and management of the defendants' business.

(6) The defendant, the City of Birmingham, states that plaintiff's complaint fails to state a claim against the City upon which plaintiff is entitled to relief.

(7) The defendant, Arthur Deutcsh, raises the defense of qualified immunity.

(8) The defendants state that Arthur Deutcseh may not be sued in his "official capacity."

7. *Discovery and other pre-trial procedures.*

(a) The parties are given leave to proceed with further discovery in accordance with previous extension grant.

(b) The Standard Pre-trial Procedures specified on Exhibit A hereto are adopted as part of this order.

(c) Pending discovery motions: None

8. *Trial.* [Jury case] When the case is called for trial, the parties shall present to the court any special questions or topics for voir dire examination of the jury venire, and, to the extent the same can be anticipated, any requests for instructions to the jury (including extracts of any statutes on which instructions are requested).

ORDERED this 20th day of April, 1993, that the above provisions are binding on all parties unless modified by further order for good cause shown.

/s/ William M. Acker
United States District Judge

[Filed Apr. 5, 1995—Entered Apr. 5, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,

Plaintiff,

vs.

THE CITY OF BIRMINGHAM,

Defendant.

PRETRIAL ORDER

A pretrial conference was held in the above case on April 5, 1995, wherein or as a result of which, the following proceedings were held and action taken:

1. *Appearances*: Appearing at the conference were:

Plaintiff: Clay Ragsdale

Defendant: John Edens
Tom Bentley

2. *Jurisdiction and venue*: Jurisdiction exists pursuant to 28 U.S.C. § 1331.

3. *Consolidation*: Not applicable.

4. *Parties and trial counsel*: Any fictitious defendants are hereby DELETED. The parties before the Court are correctly named as set out below and the designated trial counsel for the parties are as set out below:

PARTIES	*TRIAL COUNSEL*
Plaintiffs:	
Scott Morro	M. Clay Ragsdale E. Ansel Strickland (Law Offices of M. Clay Ragsdale)
Defendants:	
City of Birmingham Johnny Johnson, in his official capacity as Police Chief (substituting for former Chief Deutcsh)	John Edens Thomas Bentley, III Mike Fleagle City of Birmingham Department of Law

5. *Pleadings*: The following pleadings (with modifications contained in this Order) have been allowed: Complaint (as amended) on behalf of the plaintiff; Answer on behalf of defendants.

6. *Statement of the Case*:

(a) *Agreed Summary*: Plaintiff is a police officer employed by the City of Birmingham who, on October 9, 1990, was suspended without pay for thirty (30) days. Plaintiff appealed the disciplinary action to the Personnel Board of Jefferson County which appeal was successful and the suspension was reversed.

(b) *Plaintiff's position*: Plaintiff's positions are set forth in detail in the complaint which is adopted as if fully set forth herein. In summary, plaintiff contends that the disciplinary action instituted against him was for the purpose of punishing him for attending a public trial and to deter him and other employees from associating or discussing matters of public concern.

(c) *Defendants' position*:

(1) The defendant deny each and every material allegation of plaintiff's complaint filed in this cause.

(2) The defendant raise, as an affirmative defense, the *Mt. Healthy* defense, in that in spite of any other factors relating to the plaintiff's employment, the defendant would have taken the same action regarding his employment.

(3) The defendants stated that all of its actions with respect to the employment of plaintiff were made on the basis of rational factors and were not a pretext, nor were they arbitrary or capricious, nor for any unconstitutional purpose.

(4) The defendants state that to the extent that the complaint alleges a claim against it for punitive damages, the City of Birmingham contends that such a claim is barred by the holding in *City of Newport v. Facts Concerts* 453 U.S. 247 (1981).

(5) The defendants state that all actions taken by it in regard to plaintiff's employment were necessary for the effective operation and management of the defendant's business.

(6) The defendants state that plaintiff's complaint fails to state a claim against the City upon which plaintiff is entitled to relief.

7. *Discovery and other pretrial procedures*:

(a) The parties are given leave to proceed with further discovery provided it is commenced in time to be completed by August 4, 1995.

(b) The Standard Pretrial Procedures specified on Exhibit "A" hereto are adopted as part of this Order.

(c) Pending discovery motions: None

8. *Trial*: (Jury case) When the case is called for trial, the parties shall present to the court any special

questions or topics for voir dire examination of the jury venire, and, to the extent the same can be anticipated, any requests for instructions to the jury (including extracts of any statutes on which instructions are requested). The case is set for trial at 5:00 A.M. September 18, 1995.

ORDERED this 5th day of April, 1995, that the above provisions be binding on all parties unless modified by further Order for good cause shown.

/s/ William M. Acker
United States District Judge

[Transcript of Portions of Trial Proceedings]

CONFERENCE

* * * *

[448] MR. BENTLEY: Your Honor, I don't have any objection to that. I would ask that the plaintiff dismiss Chief Johnson in his official capacity. I don't think that puts the plaintiff in any prejudicial position.

THE COURT: I don't either. It might even help you for me to tell the jury that he's moved to dismiss the case against the chief, the present chief.

MR. BENTLEY: There are a couple of other matters though, Your Honor—

THE COURT: All right.

MR. BENTLEY: —that bother me greatly. And I should have mentioned them before, but I think now is the time to mention them.

Your Honor. I do not agree that Chief Deutcsh was the final policymaker as far as discipline was concerned. I do not agree with that because his decisions were subject to review. And it's difficult under the law under *Praprotnik* to envision that a final decision maker's decisions are indeed subject to review themselves. And the final policymaker on—

THE COURT: So your view would be arguing that the final policymaker is the Personnel Board?

MR. BENTLEY: Yes, sir. And withdrawing my suggested jury instruction No. 14, which I just now saw, which someone else wrote.

[449] THE COURT: Wait a minute. I was going to give that one.

MR. BENTLEY: You probably were.

THE COURT: You probably would have caught it.

MR. BENTLEY: That's what reminded me.

THE COURT: I was going to give it grandly and stand up when I did it.

Incidentally, one reason for not giving it is your spelling. Instead of deprivations, you've got depravations. That sounds like somebody is depraved.

MR. FLIEGEL: That's the word processor.

THE COURT: I wouldn't want to call anybody at the City depraved.

MR. RAGSDALE: I was going to use that in my closing.

THE COURT: He's not charging y'all with being depraved. He's charging that he was deprived.

Well, okay. 14, I won't give 14.

But let's get back to the *Praprotnik* thing and the Personnel Board because, you know, that may be an interesting kind of question. That is in a way an argument that I'm not saying—I'm not faulting you for not having articulated it sooner before I ruled as I did on your 59(a) motion. I think that was probably the time to spring it and not after I had already ruled.

[450] But let's rethink it a minute. Let's renew or allow you to reimpose the 50(a) motion in light of the argument that Chief Deutcsh was not the final decision maker and therefore was not the City of Birmingham. Instead, the Personnel Board was.

It's sort of an interesting argument, a little bit of an anomaly—I say not just a little bit. I guess things are either an anomaly or they are not an anomaly. It's kind of like things are not just a little bit unique. They are either unique or they're not unique. But Chief Johnson has said he disagrees with the Personnel Board a good bit of the time and that he makes decisions from time to time of a disciplinary nature that are reviewed by the Personnel Board, and that it from time to time disagrees with him. I guess from time to time he agrees with it.

If you took your *Praprotnik* argument to its logical conclusion or illogical conclusion, a police chief who under the state law is the manager of the police department, he's the person who, the testimony is, conducts a disciplinary hearing, he initiates the thing, and imposes the discipline, makes a disciplinary decision, actually makes it, says you are fired or says you are suspended or says whatever he says. If he is not for the purposes of 1983 the City and instead the Personnel Board is the City,

because we know that the mayor is not for the purposes of this, we know the city [451] council is not. So it's got to be either the police chief or the Personnel Board because it's the reviewer and the final decider. So if it's the Personnel Board, then I guess this plaintiff should have sued the Personnel Board, but the Personnel Board agreed with him. So he certainly wouldn't want to be ugly and sue the Personnel Board that agreed with him. So they sued the person that they thought, or he thought, had discriminated against him or had violated his First Amendment rights.

Now, if—and let's get back to the logical or illogical conclusion of saying that the Personnel Board or saying that Deutcsh was not the decider for the City of Birmingham for 1983 purposes. A police chief, if that's true, could have absolutely impunity and the City of Birmingham could with absolute impunity could have the police chief do the most egregious things with respect to employees, punish them across the board for no reason whatsoever knowing, expecting the Personnel Board to correct it and never be subject to suit under 1983. Now, tell me why I'm wrong on that.

MR. BENTLEY: I think if there's anything wrong with that, it is this: You have said that under state law the police chief is the final decision maker. Well, the rules and regulations, the existence in fact of the Personnel Board are creations of state law. And that state law in the state of Alabama provides for a personnel board, provides for that [452] personnel board to create rules and regulations, provides for an appeal process—

THE COURT: Let me ask you—Excuse me for interrupting, but do you happen to know off the top of your head whether the City of Leeds, which is in Jefferson County, has the same relationship with the Personnel Board that the City of Birmingham does?

MR. BENTLEY: I happen to know that it doesn't because Leeds, it's for—the Personnel Board Act that applies to the City of Birmingham applies to cities in Jefferson County that are wholly within Jefferson County.

And I believe Leeds is in part in another county. I'm not sure whether it's St. Clair or Shelby.

THE COURT: It is in St. Clair, it's partly in St. Clair. I know that.

MR. DAWSON: And in Shelby. And it is under the Personnel Board now.

THE COURT: It is? The reason I ask is I've got something to share with you right quick.

Well, I don't have time. I'm going to lunch right now. I'll share it with you when I get back, but I'm going to tell you now. *Richardson v. City of Leeds* on application for rehearing and suggested rehearing en banc, a review of Judge Acker by Police Officer Richardson who sued the City of Leeds Police Department and the Chief. The Eleventh Circuit, as of [453] now, subject, of course, to change, and I doubt that there will be in this regard or probably in any other regard, equates the chief to the city. And that's why I asked the question is it under the personnel board.

Now, that the question of the *Praprotnik* expansion or application was not raised, and I'm not going to try to fool you into thinking that the big factor, a big argument, in the Eleventh Circuit had to do with who the ultimate decider was, it was assumed, it was said, everybody agreed that it was the chief who administered, that made the decision. In that case the decision was not to discipline but not to employ or reemploy. The police officer had quit, reapplied, and the chief refused to rehire. So the issue was not precisely the same.

But the question here as far as who the decider is under the law of Alabama, I think is the same. I think.

MR. BENTLEY: I don't know when they voted. Bill may have some information on it. I don't know when they became a part of the system.

THE COURT: This case could have arisen.

MR. RAGSDALE: That was in May of '93, I think, Your Honor.

THE COURT: You think that Leeds came under it in '93?

MR. RAGSDALE: I believe it—

[454] THE COURT: I wouldn't be surprised if this Richardson case didn't start before '93. Could have been, so that issue—that would have been a good reason for it not to—I'm going to check *Richardson* during the lunch hour, but I'm going to lunch right now. See you at 1 o'clock.

MR. BENTLEY: Can we resume this at that point?

THE COURT: Yes, we can.

(Lunch recess from 11:43 a.m. to 1 p.m.)

(Jury not present.)

AFTERNOON SESSION

THE CLERK: Remain seated.

THE COURT: We were still in the charge conference phase and you had something else to say.

MR. BENTLEY: Yes, Your Honor. It connects with our Rule 50 motion.

The plaintiff has offered no evidence that Chief Deutcsh's decision was, one, as a policymaker for the City of Birmingham so as to attach municipal liability under the Supreme Court's decision in *Monell*. What the evidence clearly shows in this case is that Chief Deutcsh's decision was not a final decision, was in fact a decision that was appealed, was in fact a decision that was reversed, was in fact a decision not allowed to stand, a decision which in the end had no force and no effect.

Under the law the City can only be liable—because we [455] are not here to determine the liability of Chief Deutcsh. Chief Deutcsh's liability has been determined by the Eleventh Circuit. And it said that in his individual capacity he's not liable. It gave him the defense of qualified immunity.

We are here to determine the liability of the City of Birmingham. The City of Birmingham's liability can only

be attached if the decision was one pursuant to a municipal custom, practice, or policy. The policy can be only one if he's trying to say that Chief Deutcsh's decision was the policy, then he's going to have to establish Chief Deutcsh as a policymaker. The evidence that he has presented shows that Chief Deutcsh had no policy, the final policymaking authority in this case.

THE COURT: Let me interrupt you. During the lunch hour I looked at *Richardson v. Leeds,* and I had it backwards. It was the mayor who made the decision actually not to rehire. So I was wrong when I told you what the facts were in that case. I don't think it makes that much difference, but I thought I'd just straighten the record out there.

MR. BENTLEY: I looked at it too. And I take it that possibly on the other issue we were talking about, I think it was possibly before they came under the Personnel Board.

THE COURT: Before they came under the Personnel [456] Board, before the city did?

MR. BENTLEY: Yes, sir.

And I think there are several things in the evidence before the Court that suggests that Deutcsh was not a policymaker so as to attach municipal liability.

One, you have the opinion and the decision of Ann Arnold, or Ann Elliott, reversing Deutcsh's decision. You have evidence from the plaintiff that his suspension was rescinded, the 30 days was reinstated, he was compensated, given back pay, in effect, as the Court has said, had a 30-day vacation. Also Chief Johnson has testified that he is also chief of police now and that he makes decisions on discipline but they are not final decisions. In the instance where they are over five days or if the cumulative total of the discipline is more than 10 days in 12 months, that those decisions are appealable to the Personnel Board. And it's the Personnel Board that has the final decision making authority in the discipline in those cases.

Municipal liability cannot attach in this case, and the defendants are entitled to be relieved.

THE COURT: In the case of Lassiter, is that her name?

MR. BENTLEY: Alabama A & M?

THE COURT: No. The other police officer?

MR. DAWSON: Lockhart.

[457] THE COURT: Officer Lockhart, she was a probationary officer and she was terminated. Was that reviewable by the Personnel Board?

MR. BENTLEY: That was not reviewable by the Personnel Board.

THE COURT: So that it was it was a final decision by the police chief, nonrenewable?

MR. BENTLEY: It was appealable to the mayor.

THE COURT: So in that case it would be the mayor, sort of like in the City of Leeds, he would be the final decision maker.

MR. BENTLEY: Exactly. In either case, the final decision making is out of Chief Deutcsh's hands.

THE COURT: Well, I get back to the anomaly, or the problem, of where that leads or where that could lead. And I'm not talking about the City of Leeds. I'm talking about l-e-a-d-s.

It seems to me to lead to the possibility of a Catch-22 or an employee who, if he is, if there is a mal-motive by the police chief who you say does not have final authority, then but for the possibility, small though it may be, of getting, penetrating the qualified immunity defense, that's all he's got.

MR. BENTLEY: That's really the case. And fair or unfair as that is—

[458] THE COURT: Well, of course, I'm not the final arbiter of just what, quote, fairness or just, quote, morality public or private. I'm here to try to decide what the law of the United States is and to do the best I can to apply it. And you may be right, but it will take the Eleventh Circuit to explain it to me. You've done a good

job of trying to explain it to me, and I understand your position. But in all due respect, I don't agree with it.

And that's why I've already ruled your Rule 50 motion because of what you say now was true at the end of the plaintiff's case just as it is now. Everything you've said was apparent at that time and it's apparent now. And if you had been right, if I had thought you were right then, I should have saved you the time and trouble of putting on your evidence.

Anyway, overruled. And we'll move on to your 40 minutes to the side. You've got your hands up again.

MR. BENTLEY: No, sir. Not about what you have ruled on.

THE COURT: All right.

MR. BENTLEY: It's about another thing that I think we need to clear up and have some guidance from the Court.

THE COURT: All right.

* * * *

[Filed Mar. 29, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number: CV 92-AR-2339-S

SCOTT MORRO,
Plaintiff,

vs.

THE CITY OF BIRMINGHAM, *et al.*,
Defendants.

DEFENDANTS' RENEWED MOTION FOR ENTRY OF JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY MOTION FOR A NEW TRIAL

Comes now the City of Birmingham, defendant in the above-entitled action and respectfully moves the court, pursuant to Federal Rules of Civil Procedure, Rule 50, to reopen the judgment entered by the Court on March 21, 1996 and enter judgment as a matter of law in favor of defendant City of Birmingham. Defendant requests that the Court leave undisturbed that part of its Order of March 21, 1996 which dismissed the plaintiff's claims against Chief Johnnie Johnson in his official capacity as Chief of the Birmingham Police Department. Alternatively, the defendant requests entry of an Order by the Court granting it a new trial in this cause.

As grounds for the requested relief defendant states and shows unto the Court the following:

1. At the close of all the evidence presented at the trial there existed no legally sufficient evidentiary basis for a

reasonable jury to find for the plaintiff against defendant City of Birmingham.

2. Plaintiff failed to adduce evidence that the deprivation he claimed the City was liable for was caused or occurred pursuant to a municipal policy as required for the imposition of municipal liability by *Monell v. Department of Social Services,* 436 U.S. 658 (1978); *Wideman v. Shallowford Community Hospital, Inc.,* 826 F.2d 1030 (11th Cir. 1987). In particular, the evidence clearly, precisely and without controversy showed that former Birmingham Police Chief Arthur Deutcsh was not and could not, as a matter of law, be found to be a policy maker for the City of Birmingham on disciplinary matters under the holding of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama and the law of the State of Alabama which those holdings aforementioned require the Court to look to in determining who is a policy maker (including any local ordinances or regulations which are applicable. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida,* 971 F.2d 708 (11th Cir. 1992; *Hill v. Clifton,* 74 F.3d 1150, (11th Cir. 1996); *Bahakel v. City of Birmingham,* No. CV90-JT-1834-S [(N.D. AL March 10, 1992, unpublished memorandum opinion of Judge Propst, affirmed without opinion 986 F.2d 507 (11th Cir. 1993), *en banc* reh. den. 992 F.2d 330 (11th Cir. 1993)]. See Appendices containing Act No. 248, H.580, of the Alabama Legislature of 1945 p. 376 as amended (the Jefferson County Personnel Board Enabling Act), The Jefferson County Personnel Board Rules and Regulations, Act No. 452 of the Alabama Legislature of 1955, as amended (excerpts from the Mayor-Council Act- establishing the form of government adopted by the

citizens of the City of Birmingham), Supplemental Personnel Rules and regulations adopted by the City of Birmingham.

3. The evidence in this case clearly, precisely and without controversy showed that the personnel disciplinary decisions of the Chief of the Birmingham Police Department (both Chief Deutcsh and Chief Johnson) were subject to review by the Jefferson County Personnel Board and in come cases by the Mayor of the City of Birmingham.

4. The plaintiff adduced no substantial evidence from which a reasonable jury could find that any violation or deprivation of his First Amendment rights occurred.

5. The system employed by the Northern District of Alabama for empaneling juries violates the Jury Selection and Service Act, 28 U.S.C. § 1861, *et seq.* by causing the systematic under-representation of African-Americans in its venires.

6. The selection of the jury venire in the instant case from the remaining available jurors on the March 4, 1996 Jury List rather than the larger (and usual) March 18, 1996 Jury List operated to cause absolutely no representation of African-Americans on the venire from which the Jury in the instant case was selected.

7. The Court's ruling disallowing the City's challenge to two jurors who stated that they had strong feelings about the case which were obviously biased against the City was erroneous and prejudicial to the City.

8. The City was substantially prejudiced by the admission into evidence of a memorandum by Chief Deutcsh to members of the Birmingham Police Department. This document was not relevant and certainly if it was deemed to be relevant it's probative value was substantially (overwhelmingly) outweighed by its tendency toward unfair prejudice, confusion of issues, misleading the jury and a waste of time. Federal Rules of Evidence, Rule 403.

9. The City was substantially prejudiced by the Court's ruling disallowing the testimony of Birmingham Police Officer John Crane who would have testified that he heard the plaintiff state to others that he would refuse to testify in court. This statement by plaintiff was relevant, probative and although obviously prejudicial to the plaintiff, much more so probative as to not have its probative value substantially outweighed by any danger of unfair prejudice. Federal Rules of Evidence, Rule 403.

10. The City was substantially prejudiced by the Court's ruling admitting into evidence the report of the hearing officer. Although relevant, the report's admission in its entirety resulted in unfair prejudice, confusion of issues (the issue was what was reasonable for Deutcsh, not what Ann Arnold thought about the evidence when she heard it) and misleading the jury (who may have thought that Ann Arold's findings conclusively showed that Deutcsh could have had no reasonable basis and proper motive in disciplining the plaintiff). Federal Rules of Evidence, Rule 403.

11. The City was substantially and unfairly prejudiced by the failure of the Court to advise the jury that Deutsch had been dismissd from the case.

12. The City was substantially and unfairly prejudiced in what it could argue to the Jury concerning Deutsch's dismissal from this case by the Court's announcement of its intention to read from its memorandum opinion statements which would have been unfairly prejudicial to this defendant and misleading and confusing to the Jury. Federal Rules of Evidence, Rule 403.

13. The City was substantially and unfairly prejudiced by the failure of the Court to instruct the Jury on the basis of municipal liability under 42 U.S.C. § 1983.

14. The Court's instructions to the Jury seem to indicate that the basis of municipal liability is the legal doctrine of *respondeat superior*, this doctrine cannot be the basis

of the City's liability in a § 1983 case. *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

WHEREFORE, the defendant respectfully requests the Court to set aside and vacate its previous entry of judgment for plaintiff and enter an order granting judgment in favor of this defendant and Johnnie Johnson, Jr. in his official capacity as Chief of the City of Birmingham Police Department. Alternatively defendant requests this Court to set aside and vacate the previous entry of judgment for plaintiff and enter an order granting defendant a new trial. The undersigned also requests that the Court afford defendant an opportunity to submit a brief and materials pertinent to the legal questions herein presented and to present oral argument in support of this motion.

Respectfully submitted:

/s/ Demetrius C. Newton
by TB w/Perm
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[Entered and Denied Apr. 12, 1996]